87-1213 No.

In The
Supreme Court of United States
October Term, 1987

BAJA CONTRACTORS, INC. an Illinois Corporation, and HUMBERTO JAIMES, *Petitioners,*

vs.

THE CITY OF CHICAGO, a Municipal Corporation, MARY SKIPTON, individually and in her official capacity as Acting Purchasing Agent of Chicago, LEROY BANNISTER, individually and in his official capacity as First Deputy Purchasing Agent of Chicago, PAUL SPIELES, individually and in his official capacity as Director of Contract Compliance for the Chicago Department of Purchases, Contracts and Supplies, MCNAIR GRANT, individually and in his official capacity as an employee of the Chicago Department of Purchases, Contracts and Supplies, and SAM PATCH individually and in his official capacity as Administrative Assistant to the Mayor of Chicago *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

GARY L. STARKMAN
(Counsel of Record)
ARVEY, HODES, COSTELLO & BURMAN
180 N. LaSalle; Suite 3800
Chicago, Illinois 60601
(312) 855-5058

DONALD C. SHINE
NISEN & ELLIOTT
200 W. Adams; Suite 2500
Chicago, Illinois 60606
(312) 346-7800

Counsel for Petitioners

Pandick Technologies, Inc., Chicago • (312) 236-0200

203pp

QUESTION PRESENTED

Whether a municipality that adopts a minority business enterprise program of the type upheld in Fullilove v. Klutznick, 448 U.S. 448 (1980), violates the procedural due process requirements of the fourteenth amendment when it denies certification to a company owned and operated by a Hispanic after informal communications between city officials and company representatives but no effective notice, hearing, explanation of the facts relied upon by the City or opportunity to rebut them.

INTERESTED PARTIES

The following listed parties have an interest in the outcome of this case:

Baja Contractors, Inc.	(Petitioner)
Humberto Jaimes	(Petitioner)
Andrew Hortatsos	(Nonparty 40% owner of Baja)
City of Chicago	(Respondent)
Mary Skipton	(Respondent)
Leroy Bannister	(Respondent)
Paul Spieles	(Respondent)
McNair Grant	(Respondent)
Sam Patch	(Respondent)

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OPINION BELOW

The opinion of the Court of Appeals is officially reported as Baja Contractors, Inc. v. City of Chicago, 830 F.2d 667 (7th Cir. 1987), and is reproduced as Appendix A at pages A-1 through A-58. The district court's findings of fact and conclusions of law were stated orally on the record on May 14, 1986, and the transcript is reproduced as Appendix B at pages A-59 through A-108. Those findings and conclusions were amended orally on the record on June 9, 1986, and that transcript is reproduced as Appendix C at pages A-109 through A-121. Both sets of findings and conclusions were incorporated by reference into the district court's unreported amended preliminary injunction of June 12, 1986, which is reproduced as Appendix D at pages A-122 through A-134.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 16, 1987 (Appendix E; page A-135). A timely petition for rehearing was denied on October 20, 1987. (Appendix F; page A-137). This petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254 (1).

STATUTE INVOLVED

Executive Order 85-2 of the Mayor of the City of Chicago, dated April 3, 1985, is reproduced as Appendix G at pages A-139 through A-156.

STATEMENT OF THE CASE

Petitioners Baja Contractors, Inc. ("Baja") and Humberto Jaimes, its primary owner and chief operating officer, brought this action under 42 U.S.C. §1983 and other provisions alleging that the City of Chicago and its relevant officials operated the City's Minority Business Enterprise (MBE) program in violation of the due process clause of the fourteenth amendment. Upon petitioners' application for a preliminary injunction, the district court conducted an evidentiary hearing which disclosed the following facts:

In 1980, the City of Chicago implemented an MBE program pursuant to 49 C.F.R. Part 23 in order to receive funds from the United States Department of Transportation (USDOT). The program was expanded dramatically on April 3, 1985, when Mayor Harold Washington issued Executive Order 85-2. The Order, promulgated without submission to, or approval by, the

City's legislative body, mandated that 25% of the dollar value of all City construction contracts - not simply those involving federal funds - be committed to qualified MBEs. In addition, the Order directed the City Purchasing Agent to establish rules and regulations to implement the Order and establish uniform procedures for MBE certification as well as appeals from the denial of certification. At the time relevant to this case, no regulations had been issued.1/

1/ The City contended below that the operation of its program was based on the USDOT standards and that applicants were so informed by virtue of "special conditions" contained in bid specifications. The district court found that the Executive Order did not incorporate the USDOT regulations governing MBEs, but mandated the promulgation of independent municipal regulations. The Seventh Circuit found that much of the Order's text parallels the federal regulations as to eligibility standards, but failed to identify any component that addressed procedural regularity.

In 1983, Humberto Jaimes, an experienced concrete construction worker born in Mexico, founded Baja, acquired 60% of its outstanding shares, and became its chief operating officer.[2/] Baja applied to become - and was certified as - an MBE under a similar State of Illinois program. Thereafter, in 1984, Baja applied to the City for MBE certification. Although the City's application documents did not provide for certification by category, Jaimes listed "concrete contractor" as the nature of the firm's business. On February 28, 1985, Baja was certified by the City as an MBE.

In 1985, McNair Grant, the City's Assistant Purchasing Agent, unilaterally decided that Baja needed another MBE certification in order to supply concrete for

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2/ The other 40% of the stock was acquired by Andrew Hortatsos, a longtime friend of Jaimes, who made a capital contribution and became vice-president responsible for sales.

a project on which it was working at O'Hare Airport. Grant determined of his own accord that a "concrete contractor" could not receive MBE credit as a "concrete supplier." No written provision addressed the distinction; and it was acknowledged that a general contractor could receive credit for supplying building materials.3/

Upon being notified of the need to obtain additional certification, Baja submitted an application as a "concrete supplier." At the time of Baja's submission, the City's review process was as follows:

Mr. Grant had total and unreviewed discretion to certify MBE applicants of his

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3/ A directory widely distributed by the City lists MBEs by category. However, category designations were not established prior to the application process; and a given applicant was forced to pick at its peril. The directory itself contains a broad range of categories; and responsible City officials were unable to explain the type of work performed by certain categories of MBEs.

own volition, but no standards to guide his determination. When Grant decided not to provide certification, the matter went before the City's MBE certification committee. Under a largely informal practice,[4] this committee meets in secret at unscheduled periods to review MBE applications. One week before it makes a determination, the committee is supposed to receive the application, any additional documents submitted by the applicant and the report of a "site visit" to the applicant's premises.

In Baja's case, the "site visit" was conducted by a city employee, Calvin Triplett, who made a brief visit to Baja's location on the day before the committee met. He asked if Jaimes was running the operation; and Jaimes

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[4] The Committee, composed of various City purchasing officials, was created in the City's submission of its program to USDOT to qualify for federal funding. It functioned without a source document establishing its authority and without meaningful guidelines.

replied that he was. Jaimes further stated that his trucks were leased and a copy of the lease previously had been provided to the City. In response to Triplett's inquiry as to where certain employees had worked previously, Jaimes said two had worked for "Poulos" and a third for Case International. For reasons that are unclear, Triplett apparently concluded that three workers were supplied by Poulos & Sons, Inc. and a consultant was supplied by Material Service Corporation (MSC).5/

A written report was neither prepared nor reviewed by the committee. On the morning of the committee meeting, Triplett reported by telephone to one of the committee members and conveyed information never checked with Baja representatives. In addition the committee examined certain leases that Baja had for

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5/ In fact, Triplett was wrong. All of the employees were Baja employees, as evidenced by payroll records later submitted.

trucks and equipment which, as may be expected in the context of a new company, were secured by the pledge of Baja's assets to the lessors.6/ Without further inquiry or notice of any kind to Baja or its attorney, the City denied the application in a letter due to the alleged reliance on Poulos and MSC for "personnel, technical assistance and leasing of concrete plant and equipment."7/

After receiving the denial letter, Baja's counsel, an ex-assistant City attorney, asked

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6/ No explanation was given and no regulation was identified to preclude an MBE from leasing equipment. Indeed, equipment leasing is entirely consistent with business operations on all levels of the construction industry.

7/ Under the program submitted by the City to USDOT, the certification committee's recommendations must be conveyed in a report summarizing all the critical factors that were considered by the committee, providing a rationale for any recommendations rendered and attaching minutes, copies of the respective committee members' evaluations, and documentation provided by the contractor to the report. With respect to Baja, no such report - with or without supporting documents - was generated.

his former boss, the City's Corporation Counsel, how to correct the factual errors in the City's denial letter. He was directed to Sam Patch, an assistant to the Mayor. He gave Patch certain documents demonstrating that the employees alleged to be those of Poulos and MSC actually worked for Baja. Patch replied that "question had been raised as to whether [Baja was] overly involved in Material Service" and suggested that Baja "contact" another supplier "to see if they would supply them with concrete."

Counsel for Baja continued to contact City officials in an effort to get at the root of the problem. He was given excuses. In November, Leroy Bannister, the deputy purchasing agent, told him that "Baja had become a political issue, that Alderman Santiago had brought it up during the budget hearing." In December, he was told by McNair Grant that "no concrete suppliers had been

certified because the City was having problems on how to judge their applications." On March 6, counsel became so frustrated with the run-around that he filed an appeal to USDOT.8/

Upon receipt of the appeal notice, Bannister, not wishing to expose the shortcomings in the City's program to the USDOT, called counsel for Baja and advised him to "file a formal request for reconsideration on behalf of Baja, and that the matter could be then handled internally without having to go to the Department of Transportation."

On the following day, March 10, counsel filed the request; and, two weeks later, he accompanied Jaimes to meet with Grant. There is substantially different testimony regarding the meeting. Counsel for Baja testified that the subjects discussed at the meeting were

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8/ As demonstrated below, the courts have held consistently that this appeal does not provide an adequate administrative remedy in the circumstances and need not be exhausted as a prerequisite to judicial relief. See note 19 infra.

"the ownership of Baja vehicles and where Baja obtained concrete and the number and the ethnic background of Baja's employees." Jaimes testified that Grant informed him that there would be another meeting to review Baja's certification, that contractors could utilize Baja's services in the interim with the notation "pending certification" and that another on-site inspection would be conducted. Grant - without elaboration on the record - testified that "we discussed the reasons for Baja's denial" and that he advised them, "if I deemed additional information necessary I would request it from Baja." He never requested further information.

During the week of April 7, Norm Wheaton, a city compliance officer, visited the site for a fresh inspection. Jaimes told Wheaton that "he wanted to help with whatever [the City] needed" and instructed his bookkeeper "to show Mr. Wheaton everything he wanted to

see." All documents requested by Wheaton were provided; and he spent substantially less than one full work day reviewing documents with Baja's bookkeeper. When Jaimes asked him what he thought of Baja's operation, Wheaton replied, "its alright." When Jaimes asked about certification, Wheaton said, "off the record...you might be surprised."

Wheaton's findings were never communicated to Baja or fully reduced to writing before this lawsuit was filed. They were related to Bannister on the telephone and Bannister informed counsel for Baja by telephone that "Baja could not be certified because there was no evidence that Baja supplied anything at the airport, and that he had to rely on the inspector because he had been out there and was an accountant." Thus, the only reason provided to Baja for the

denial was a non-sequitur.[9] As a result of the denial, Baja was terminated from one of its pending contracts and, thereafter, brought this lawsuit.

On the basis of this evidence, the district court granted a preliminary injunction restraining the City from, among other things, informing contractors that Baja was not certified as a concrete supplier under

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[9] After this case was filed, Bannister ordered Wheaton to revise his report. Grant did not prepare an executive summary regarding Baja because a lawsuit had been filed. Thus, although the critical Wheaton report was prepared in anticipation of trial, Wheaton did not testify and Baja was never given an opportunity to respond to its allegations, the Seventh Circuit relied on the report as fact. The report stated: (1) that MSC was the major source of materials purchased by Baja; (2) MSC provided invoicing, billing, computerized invoice receipts and truck leasing services to Baja at no apparent cost; and (3) an MSC employee mixed the raw materials. Because the district court limited the injunction hearing to evidence regarding the City's procedures and not the merits of the application, Baja has not had an opportunity, to this day, to contest the allegations contained in the report.

the MBE program. The court found that Baja was owned and controlled by Jaimes, a member of a minority group, and that this minority ownership was sufficient to qualify Baja for certification under the Executive Order. Noting that Baja, in its original application, did not seek limited certification, the court found that there were no existing distinction between concrete contractors and concrete suppliers. Therefore, the court concluded that Baja's certification as a concrete contractor included certification as a concrete supplier.

In its analysis of the City's administration of its MBE program, the court found that the certification committee reached decisions on applications without "appropriate notice of the nature and scope of the proceedings." The court concluded that the decisions were reached without the guidance of written procedures, ascertainable standards or

a formal record. Because no rules or standards for determination of MBE certification were ever provided to Baja, because the individual defendants themselves were unable to articulate a standard by which Baja's certification was judged, and because the City's failure to promulgate such rules was a deliberate decision to deal with the existing applications for MBE certification, the court found that procedural due process requirements were not met.

Accordingly, after reviewing the traditional standards for injunctive relief,10/ the court granted a preliminary

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10/ With the exception of the likelihood of success on the merits, as it relates to the procedural due process claim, those findings are not relevant to the issue raised at bar. Essentially, the court concluded that Baja, 1) had no adequate remedy at law, 2) would suffer irreparable harm if the injunctive relief were denied, 3) the degree of irreparable harm it would suffer if the injunction were denied would be greater than the irreparable harm the City would suffer if the injunction were granted, 4) it had a (footnote continued)

injunction that precluded the City from determining that Baja is not a certified MBE concrete supplier "unless and until the City of Chicago issues an appealable order at the conclusion of a review of Baja's application for certification as a concrete supplier...conducted in accordance with due process requirements established to preserve and protect Baja's property rights...."

On appeal, the Seventh Circuit acknowledged that MBE certification, as an important business asset that provides significant competitive advantages, is a "property interest" entitled to due process protection. However, on the basis of an extremely truncated view of Mathews v. Eldridge, 424 U.S. 319 (1976), the Court held that, without regard to the systemic procedural flaws that the district court found

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(footnote continued from previous page) reasonable likelihood of prevailing on the merits, and 5) the injunction would not harm the public interest.

in the City's MBE program, the informal communications between City officials and Baja representatives were sufficient to afford procedural due process.

ARGUMENT

BECAUSE MBE CERTIFICATION PROVIDES A SIGNIFICANT COMPETITIVE BUSINESS ADVANTAGE TO A HISTORICALLY DISADVANTAGED GROUP, THE FOURTEENTH AMENDMENT'S PROCEDURAL DUE PROCESS REQUIREMENTS COMPEL A MUNICIPALITY THAT ADOPTS AN MBE PROGRAM TO PROVIDE PROCEDURES SUFFICIENTLY FORMAL TO ASSURE THAT QUALIFIED MINORITY BUSINESSES ARE NOT WRONGFULLY EXCLUDED FROM PARTICIPATION.

Since the constitutionality of the federal minority set aside statute was upheld in Fullilove v. Klutznick, 448 U.S. 448 (1978), minority business enterprise programs have become a part of the public contracting landscape at all levels of government.11/ The

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11/ See, e.g., Nolan Contracting, Inc. v. Regional Transit Authority, 651 F.Supp. 23 (E.D.La. 1986) (Louisiana RTA set aside of 30% of contract value for MBEs not unreasonable); Cornelius v. La Croix, 631 F.Supp. 610 (E.D.Wis. 1986) (damages action for improper decertification against Milwaukee sewage district); Manelli v. United States, 611 F.Supp. 606 (D.R.I. 1985) (claim of improper decertification by USDOT); COMPACT v. Metropolitan Government of Nashville & Davidson County, 594 F.Supp. 1567 (M.D.Tenn. 1984), remanded on oth'r. gr'nds., 786 F.2d 227 (6th Cir. 1986) (MBE participation is a discrete

(footnote continued)

lower courts have uniformly recognized, as did the court below, that, for due process purposes, MBE certification constitutes an important "property right" under the formulation provided by Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In short, "MBE certification is an extremely important asset to a minority business, and it is questionable whether a minority enterprise would be able to remain a viable competitor in

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(footnote continued from previous page) submarket in public contracts for antitrust purposes); South Florida Chapter, Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida, 552 F.Supp. 909 (S.D. Fla. 1982) (Dade County MBE ordinance unconstitutionally discriminatory); Interstate Material Corp. v. City of Chicago, 150 Ill.App.3d 944, 501 N.E.2d 910 (1986) (administration of Chicago Executive Order violated due process); Chrisley v. Morin, 126 A.D.2d 977, 511 N.Y.S.2d 753 (1987) (decertification of New York MBE violated due process); G. Merlino Construction Co. v. City of Seattle, 108 Wash.2d 597, 741 P.2d 34 (1987) (suspension of contractor for circumventing MBE requirements).

its industry, if MBE certification is revoked."12/

Given the magnitude of the property interest involved - one that's loss threatens the very existence of a minority owned company - the nature of the process due under the fourteenth amendment takes on dramatic significance. With the exception of the Seventh Circuit in this case, the lower courts have demonstrated acute sensitivity to the procedural formalities employed by governmental entities in the MBE certification process. See, e.g., Cornelius v. La Croix, 631 F.Supp. 610, 626 (E.D. Wis. 1986) (written notice stating reasons for contemplated action and hearing before impartial officer with opportunity to present position required); Interstate Material Corp. v. City of Chicago,

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12/ Interstate Material Corp., 150 Ill.App. 3d at 954, 501 N.E.2d at 916; see also Cornelius, 631 F.Supp. at 617; Manelli, 611 F.Supp. at 613; Chrisley, 511 N.Y.S.2d at 754.

150 Ill.App.3d 944, 953-54, 501 N.E.2d 910, 917 (1986) (some type of hearing and opportunity to respond to City's concerns required); Chrisley v. Morin, 126 A.D.2d 977, 511 N.Y.S.2d 753 (1987) (notice prior to decertification and opportunity to submit evidence required; written rules and regulations encouraged).

The Seventh Circuit's crabbed view of the fourteenth amendment's procedural due process requirements in these circumstances not only threatens petitioners' business, but also tolerates an environment in which discriminatory treatment of MBE applicants can flourish. To the extent that an unrestrained certification system is allowed, MBE programs can be used by unscrupulous governmental officials as a source of political patronage or outright graft instead of as a mechanism to attain the lofty objectives that supported the

constitutionality of the seminal program in Fullilove.

The traditional point of departure for the analysis of cases such as this was provided by Justice Jackson's often-cited observation in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950): "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Although the Court has remained steadfast in its demand for some form of process before a public entity terminates a property right,[13] it has been less inclined

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13/ See, e.g., Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) (state employment); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (access to state adjudicatory process); Barry v. Barchi, 443 U.S. 55 (1979) (horse trainer's license); Memphis Light, Gas & Water Div.
(footnote continued)

to define the nature of the process due. Thus, with the exception of the full evidentiary hearing required for the termination of welfare benefits by Goldberg v. Kelly, 397 U.S. 254 (1970), "[i]n other cases requiring some type of pretermination hearing as a matter of constitutional right, the Court has spoken sparingly about procedures." Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

In Mathews, the Court articulated the now familiar tripartite analysis for determining the constitutional sufficiency of administrative procedures:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of

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(footnote continued from previous page)
v. Craft, 436 U.S. 1 (1978) (utility service); Mathews v. Eldridge, 424 U.S. 319 (1976) (disability benefits); Goss v. Lopez, 419 U.S. 565 (1975) (high school education); Connell v. Higginbotham, 403 U.S. 207 (1971) (government employment); Bell v. Burson, 402 U.S. 535 (1971) (driver's license).

> such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

424 U.S. at 335. Although the formulation is unassailable, its contours require further definition to assure consistent application and to avoid absurd results such as that reached below.

Thus, as in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 545 (1985), proper application of the Mathews factors to a given set of circumstances may yield the conclusion that "something less than a full evidentiary hearing is sufficient prior to adverse administrative action." However, the Seventh Circuit's simple citation of the

Loudermill dictum without reasoned analysis of the Mathews factors in a case involving a deprivation of this magnitude confirms Judge Friendly's observation of more than a decade ago: "While I applaud the Court's basic initiatives with respect to administrative hearings, the time for some new thinking and also for some tidying up has arrived."14/

The need for additional guidance to the lower courts in the factual setting at bar flows from three sources that coincide with the Mathews factors. First, the burgeoning development of MBE programs in the wake of Fullilove has created a new submarket in the public contracting field.15/ Buoyed by the competitive leverage granted by the programs,

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14/ Friendly, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267, 1317 (1975).

15/ See, e.g., COMPACT, 594 F.Supp. at 1571-72 (holding that an agreement by minority subcontractors with respect to MBE utilization in the construction of a Nashville airport could represent an antitrust violation).

MBEs are being created throughout the nation to inject new sources of capital into the contracting industry and create new areas of minority employment. While an applicant for certification generally must receive procedural protection sufficient to assure fair consideration,16/ the demand is more compelling in a situation tantamount to a revocation, like that at bar, because "capital has been expended, investor expectations have been aroused, and people have been employed."17/ Accordingly, the "private interest that will be affected by the official action," within the meaning of Mathews, is inexorable.

Second, in light of the prominence of the private interest involved in the MBE

16/ E.g., Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963) (applicant for admission to bar entitled to notice and hearing with confrontation and cross-examination).

17/ Friendly, supra note 14, at 1296.

certification process, the lower courts should be restrained from broad application of the holdings of Mathews and Loudermill without reference to the factual circumstances in which they were decided. Both Mathews and Loudermill involved situations in which concrete written guidelines governed the substantive claim at issue and the procedural process. In Mathews, the applicant knew that benefits were contingent upon medical inability to engage in gainful activity; the procedures focused on written evaluations of medical reports reviewed by both the state agency and the Social Security Administration to determine continuing entitlement to disability benefits (along with a post-termination appeal to the state agency). In Loudermill, the employees knew that they were discharged for specific reasons; the procedures provided a pretermination

opportunity to respond to the known basis for discharge and a post-termination administrative process under state law. In both cases, due process without a formal hearing was satisfied by the predeprivation opportunity to meet the specific charge and the availability of articulated post-deprivation procedures.

Here, in sharp contrast, there are no written procedures to govern the process and no opportunity to respond to specific allegations of ineligibility. As the district court unequivocally found:

> * The City had no "regularized structured procedure with defined categories for certification." (Tr. 10).[18]
>
> * The "ground rules [under which the City would determine Baja's application for MBE certification as a concrete supplier]

18/ All transcript references are to the May 14, 1986, proceeding, reproduced as Appendix B.

were never really provided to [Baja]." (Tr. 16).

* The lack of process was confirmed by the "inability of the defendants themselves to articulate the standards and procedures and where they could be found." (Tr. 16).

* The "rules, if they can be called that, are changing on a continuing basis. They are sort of being made up as the defendants go along." (Tr. 17).

* "The City's MBE certification procedures are amorphous. No written procedures exist under which the defendants can determine the faith of an MBE candidate's application on any consistent basis." (Tr. 19).

* "With respect to applications presented to [the certification] committee, the decisions are reached...without appropriate notice of the nature and

scope of the proceedings. They are certainly provided without written procedures; they are done without a formal record...[and] without properly formulated and announced standards or other implementing rules and regulations." (Tr. 19-20).19/

Most importantly, the district court found that the "amorphous, the standardless, procedures now followed, creates the risk of effectively unreviewable error." (Tr. 29). Despite its obligation to accept these findings on a highly deferential basis,20/ the

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19/ Because of the absence of any sort of record, the court found that access to post-deprivation procedures was meaningless. In any event, the right to a post-termination appeal to USDOT does not provide a meaningful remedy because, as the Court below found, "Baja would be denied MBE status and lose the concomitant advantage in competing for contracts for an indefinite period of time." 830 F.2d at 675 n.7; see also Interstate Materials Corp., 150 Ill.App.3d at 956; 501 N.E.2d at 917.

20/ See Anderson v. Bessemer City, 470 U.S. 564 (1985).

Seventh Circuit simply catalogued the informal communications between City officials and Baja representatives and concluded that Baja received "adequate protection against the risk of an erroneous deprivation of its property interest" by virtue of the "opportunity, during the application process, to present evidence of independent ownership and control." 830 F.2d at 679.

The Seventh Circuit's cavalier conclusion that there was adequate protection against erroneous deprivation ignores the fact that Baja was never told what evidence the City was relying upon to demonstrate lack of independent ownership and control and no opportunity to rebut it. While Mathews and Loudermill permit something less than full evidentiary hearings to comport with due process in certain circumstances, the lower courts should not be permitted to read them, as did the Seventh Circuit, to eliminate any

semblance of procedural regularity. The risk of erroneous deprivation is greatest when the process is undefined and informal; and the circumstances at bar underscore the need for some degree of formality to protect against the type of error that can destroy a business.

Here, even if the City was following the USDOT guidelines (although neither of the lower courts found that it was), it was obliged to consider "the degree to which financial, equipment leasing, and other relationships with non-minority firms vary from industry practice...." 49 C.F.R. §23.53 (emphasis added). Baja was never provided with an opportunity to demonstrate that its operations were entirely consistent with industry practice or that the conclusions of the City's site inspectors were factually

incorrect.[21] The risk of an unreviewable erroneous deprivation, as the district court found, was not simply present in light of the amorphous "procedures" employed by the City, the risk became reality.

The third Mathews factor - governmental interest - takes on added significance when applied to MBE programs. While the Seventh Circuit dismissed this criterion with the simple truism that the City has a compelling interest in assuring that MBE applicants "are not serving as fronts for other non-minority owed corporations," 830 F.2d at 679, it ignored the degree of procedural protection needed to prevent legitimate MBEs from wrongly being excluded as "fronts."

On the bottom line, the MBE program represents an attempt by the City to

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[21] Indeed, Baja never knew the "facts" determined by the site inspectors until they were revealed, through written reports, in the district court evidentiary hearing.

ameliorate the disabling effects of past discrimination in the public contracting area. When a governmental entity seeks to justify a remedial action on the basis of "suspect" race-conscious classifications, "the means selected must be narrowly drawn to fulfill the governmental purpose." Fullilove v. Klutznick, 448 U.S. 448, 498 (1980) (Powell, J., concurring); see University of California Regents v. Bakke, 438 U.S. 265, 317-18 (1978).

Here, the City's haphazard administration of its MBE program constitutes the antithesis of a narrowly drawn program designed to redress past discrimination. In fact, far from the benevolent objectives that sustain the program's constitutional existence, the record is cluttered with references to political and patronage considerations in its administration.22/ Although the governmental

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22/ For example, the Mayor's assistant told counsel for Baja that Baja should use a raw material supplier other than MCS and (footnote continued)

interest concern of Mathews focused on fiscal and administrative burdens,[23] there is an equally compelling governmental interest in providing an MBE program that assures access to qualified minorities.

Therefore, the "governmental interest" in this case, rather than providing the City with a defense to lax procedures, should compel the use of a more sophisticated process designed to assure the accuracy of the administrative proceedings. The growing list of governmental units that have adopted MBE programs should be reminded that procedural regularity lies at

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the deputy purchasing agent told him that "Baja had become a political issue, that Alderman Santiago had brought it up during the budget hearing."

23/ The district court concluded that, on the facts presented, City officials "don't even have the excuse of administrative inconvenience. For what they have done is so far short, and the additional requirements are so plainly workable, that they cannot make and have not made, effective arguments in that regard." (Tr. 30).

the heart of the truth-seeking process. In light of the competitive advantage provided by MBE participation, the burgeoning development of MBE programs throughout the nation and the benevolent motives that undergird their creation, local governments that adopt MBE programs should be sensitized to Justice Frankfurter's due process aphorism in his historic concurrence in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-72 (1951):

> "That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in

> jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."

(footnote omitted).

The analytical sophistry used by the Seventh Circuit to uphold the City's action does not alter the fact that these noble precepts were violated at bar. This Court should make it clear that the fourteenth amendment's guarantee of procedural due process is not a promise to the ear to be broken to the heart.

CONCLUSION

For these reasons, a writ of certiorari should be granted to review, and ultimately reverse, the decision below.

Respectfully submitted,

Gary L. Starkman
(Counsel of Record)
Arvey, Hodes, Costello & Burman
180 N. LaSalle; Suite 3800
Chicago, Illinois 60601
(312) 855-5058

Donald C. Shine
Nisen & Elliot
200 W. Adams; Suite 2500
Chicago, Illinois 60606
(312) 346-7800

Counsel for Petitioners

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-1990
BAJA CONTRACTORS, INC., et al.,
Plaintiffs-Appellees,
v.
THE CITY OF CHICAGO, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division
No. 86 C 2655-Milton I. Shadur, Judge.

ARGUED JANUARY 20, 1987-
DECIDED SEPTEMBER 16, 1987

Before FLAUM and RIPPLE, Circuit Judges, and ESCHBACH, Senior Circuit Judge.

RIPPLE, Circuit Judge. Appellees, Baja Contractors, Inc. (Baja) and Humberto Jaimes, filed suit under 42 U.S.C. § 1983 against the City of Chicago and certain City employees, Mary Skipton, Leroy Bannister, Paul Spieles, McNair Grant and Sam Patch (referred to collectively as the City), alleging that the

City's administration of the Minority Business Enterprise (MBE) program violated the fourteenth amendment's due process clause. After having granted Baja MBE certification, the City classified Baja as a "concrete contractor." It later refused to permit Baja to use its MBE certification to receive credit for work done as a "concrete supplier" without reapplication. When Baja reapplied, it was denied certification. After a hearing on Baja's motion for a preliminary injunction, the district court issued a preliminary injunction restraining the City from, inter alia, determining that Baja is not a concrete supplier under the MBE program until the City conducted a review of Baja's application "in accordance with due process requirements established to preserve and protect Baja's property rights pursuant to applicable laws." Baja Contractors, Inc. v. City of Chicago, No. 86 C 2655, Amended Preliminary Injunction at 6

(N.D. Ill. June 12, 1986); R.41 at 6. For the reasons set forth in this opinion, we reverse the judgement of the district court.

I

Facts

A. Introduction

Baja, an Illinois corporation, was formed in 1983 by Humberto Jaimes and Andres Hortatsos. In August, 1983, the Illinois Department of Transportation certified Baja to perform "miscellaneous concrete construction" work on state contracts as a disadvantaged/minority business enterprise. In December 1984, Baja applied to the City for MBE certification. On the application, it listed the nature of its business as "concrete contractor." The City granted this application for certification on February 28, 1985 and listed Baja as a "concrete contractor" in its directory of MBE's.

However, when Baja started working on a City contract supplying concrete, city officials notified Baja that it needed a separate MBE certification as a concrete supplier. Baja then filed an application for certification as a concrete supplier. The City denied this application. After attempting to appeal the denial of certification within the City administration,[1/] Baja sought injunctive relief.

Before analyzing Baja's procedural due process claim against the City, we will first describe the structure of the City's MBE program and then discuss in greater detail Baja's efforts to obtain MBE certification as a concrete supplier.

1/ Baja also filed an appeal with the USDOT pursuant to 49 C.F.R. § 23.55 (1986). See infra notes 3 & 7.

B. The City's MBE Program

The purpose of the MBE program is to afford businesses owned and controlled by members of historically disadvantaged groups, including minority groups and women, an increased opportunity to compete for contracts. The City's MBE program initially was implemented because the City received funds from the United States Department of Transportation (USDOT) and was required by the USDOT to establish an MBE program approved by the USDOT that would apply to all federally-funded contracts. The City's program was established pursuant to USDOT regulations contained in 49 C.F.R. part 23.2/ In August

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2/ The USDOT regulations define a minority business enterprise (MBE) as "a small business concern...which is owned and controlled by one or more minorities or women." Under the regulations, ownership and control means that a business must be "at least 51 per centum owned by one or more minorities or women or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by one or more minorities or women; and

(footnote continued)

1980, the City's first MBE program was submitted to the USDOT for approval. On June 16, 1981 a revised version of the program was submitted. See R.48, Defendants' Ex. 24.

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[its] management and daily business operations are controlled by one or more such individuals." 49 C.F.R. § 23.5(f) (1986).

The regulations further provide that:

> The following standards shall be used by recipients in determining whether a firm is owned and controlled by one or more minorities or women is [sic] and shall therefore be eligible to be certified as an MBE. Businesses aggrieved by the determination may appeal in accordance with procedures set forth in §23.55.
>
> Bona fide minority group membership shall be established on the basis of the individual's claim that he or she is a member of a minority group and is so regarded by that particular minority community. However, the recipient is not required to accept this claim if it determines the claim to be invalid.
>
> An eligible minority business enterprise under this part shall be an independent business. The ownership and control by minorities or women shall be real, substantial, and continuing and shall go beyond the pro forma ownership of the firm as reflected in its ownership

(footnote continued)

In April 1985, Mayor Harold Washington issued Executive Order 85-2 (Executive Order), designed to augment the City's existing MBE program. The Executive Order mandated that the specifications for construction contracts contain a requirement that the "bidder commit to the expenditure of 25% of the dollar value of the contract (including any modifications) with one or more MBEs and 5% of the dollar

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> documents. The minority or women owners shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interests, as demonstrated by a [sic] examination of the substance rather than form of arrangements. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for recognition as an MBE. In determining whether a potential MBE is an independent business, DOT recipients shall consider all relevant factors, including the date the business was established, the adequacy of its resources for the work of the contract, and the degree to which financial, equipment leasing, and other relationships with nonminority firms vary from industry practice.
>
> Id. § 23.53(a)(1) and (a)(2).

value with one or more WBEs [women business enterprises]." R.1, Ex. A at 4-5. The Executive Order also required the City's Purchasing Agent to "[i]ssue rules and regulations to implement the procedures designed by the Contract Compliance Officer...." Id. at 7. Under the Executive Order, the Contract Compliance Officer was directed to:

> Establish uniform procedures to apply for certification as MBE or WBE, and to appeal from denial of certification as MBE or WBE. Each application for certification shall be in writing, and executed under oath by an officer or owner of the applicant, and shall contain such information as may assist the Contract Compliance Officer in determining the status of the applicant.

Id. at 8. The City has drafted regulations to implement the Executive Order, but a final set of rules under the Executive Order had not been issued at the time of this appeal. The district court found that the Executive Order did not incorporate the USDOT regulations, but rather required the promulgation of rules to

implement its mandate separately from the federal regulations. See Tr. of May 14, 1986 at 18. However, much of the language contained in the executive Order parallels the text of the USDOT regulations. For example, the City's definition of an MBE is identical to the definition contained in the USDOT regulations. Compare R.1, Ex. A at 3 with 49 C.F.R. § 23.5(f) (1986). In addition, for federally-funded projects, a contractor must comply with both the USDOT regulations and the Executive Order. See Minority Business Enterprise Commitment and Women Business Enterprise Commitment; Appellants' App. at 52.

The USDOT regulation express concern over maintaining the integrity of the MBE program by preventing non-minority owned enterprises from controlling MBEs. The regulations recognize that:

> Substantial concern has been expressed abut the infiltration of DOT-assisted programs by "fronts"- businesses that claim to be owned and controlled by minorities, women, or other disadvantaged

> individuals, but which, in fact are ineligible for participation is [sic] DOT-assisted programs as MBEs, WBEs or disadvantaged businesses.
>
> The Department wants to take this opportunity to reemphasize the importance of scrutiny of all firms seeking to participate in DOT-assisted programs. We believe strongly that recipients should take prompt action to ensure that only firms meeting the eligibility criteria of 49 CFR Part 23 participate as MBEs, WBEs, or disadvantaged businesses in DOT-assisted programs. This means not only that recipients should carefully check the eligibility of firms applying for certification for the first time, but also that they should review the eligibility of firms with existing certifications in order to ensure that they are still eligible.

49 C.F.R. part 23, subpart D, app. A, at 150. In its Executive Order, the City responded to the concern expressed in the USDOT regulations about MBEs serving as "front" by directing the contract compliance Officer to:

> Investigate the status of certified MBEs and WBEs to determine whether they should retain certification. An investigation of the status of all currently certified MBEs and WBEs shall be undertaken immediately after the effective date of this Order, with priority given to investigation of previously certified firms to which

> contracts or subcontracts are awarded after the effective date hereof.

R.1, Ex. A at 8-9.

The Executive Order set time limitations for the city to consider an application for MBE certification. The Executive Order provides that "[i]nitial certification of any entity as MBE or WBE, or denial of such certification, shall be completed no later than 60 days after receipt of bid or proposal for a contract or subcontract contemplating the applicant's participation as MBE or WBE." Id. at 8. However, the Executive Order does not specify any process of appeal from the City's decision. The USDOT regulations, on the other hand, do provide for an appeal from denial of certification.3/ However, the

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3/ The regulations provide the following means of appealing a denial of MBE certification:

> Any firm which believes that it has been wrongly denied certification as an MBE or joint venture under §§ 23.51 and 23.53 by the Department or a recipient of (footnote continued)

denial of certification is not stayed during an appeal. See 49 C.F.R. part 23, subpart D, app. A, at 150 (1986).

C. Baja's Application for MBE Certification

On February 28, 1985, the City notified Baja by letter that it had received certification as a disadvantaged business enterprise.4/ Baja further was informed that

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DOT financial assistance may file an appeal in writing, signed and dated, with the Department. The appeal shall be filed no later than 180 days after the date of denial of certification. The Secretary may extend the time for filing or waive the time limit in the interest of justice, specifying in writing the reasons for so doing. Third parties who have reason to believe that another firm has been wrongly denied or granted certification as an MBE or joint venture may advise the Secretary. This information is not considered an appeal pursuant to this section.

49 C.F.R. § 23.55(a) (1986).

4/ The term disadvantaged business enterprise (DBE) encompasses both minority and women business enterprises.
(footnote continued)

it would be listed as a "concrete contractor" in the City's directory of MBEs and that the firm's eligibility would be reviewed on a annual basis. R.1, Ex. B.

In May 1985, Baja started working as a concrete supplier at the O'Hare Airport Development Project as a sub-contractor for the Turner Construction Company (Turner). After Baja had started working at O'Hare, a city employee contacted Mr. Jaimes and notified him that Baja needed MBE certification as a concrete supplier in order to work on the contract at O'Hare. In response, Baja sent the City a letter on July 15, 1985 requesting certification as a concrete supplier. Appellants' App. at 53; R.1, Ex. D.

In September 1985, Mr. Triplett, a city employee, inspected Baja's concrete plant at

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For the purposes of this appeal, the terms MBE and DBE are synonymous.

O'Hare. Mr. Triplett indicated that he was inspecting the operation to determine whether Mr. Jaimes was running the operation himself. In the report to the City regarding his site inspection, Mr. Triplett indicated that Peter J. Poulos & Sons, Inc. (Poulos) leased the concrete mixer to Baja and supplied three workers. Further, a consultant from Material Service Corp. was in charge of quality control for the mixer. Baja also leased trucks from Material Service Corp. Appellants' App. at 99-100 (oral report later committed to writing).

On September 9, 1985, the MBE Certification Committee sent a letter to Baja notifying it that it was denied MBE certification as a concrete supplier. R.1, Ex. E. The letter indicated that the City had denied certification because a review of Baja's application and supporting documents did not indicate that Baja was an

independently operated business. Specifically, the letter referred to "reliance upon Pavlos [sic] and Sons, Inc. and Material Service Corp. for personnel, technical assistance, leasing of concrete plant and equipment" as evidence that Baja was not independently operated. Id. In this letter, the City stated that its decision was final, but notified Baja that an appeal could be filed with the USDOT. Further, a city employee informed Baja's attorney that the City generally was amenable to considering additional information about an application after it had been denied.

On September 17, 1985, Baja's attorney met with city officials and requested that they reconsider Baja's application for MBE certification as a concrete supplier. On February 20, 1986, Baja's attorney wrote to the City formally requesting reconsideration of Baja's application. Appellants' App. at

28. In this letter, Baja indicated that, if the City had not provided it a final determination by March 4, 1986, it would conclude that reconsideration had been denied. On March 6, Baja exercised its right to file an appeal from denial of certification with the USDOT. Appellants' App. at 34. Four days later, on March 10, Baja submitted additional documents and filed a formal appeal with the City. Appellants' App. at 29-30. The City's Assistant Purchasing Agent met with Mr. Jaimes and Baja's attorney regarding Baja's appeal and the City again inspected Baja's work site at O'Hare. This report indicated that "Material Service Corporation provides invoicing, billing, computerize [sic] invoice receipts, and truck leasing services to Baja at no apparent cost for these services. An employee of Material Services [sic] Corporation was seen on the premises mixing the various raw materials." Appellants' App.

at 102 (oral report later memorialized). The report concluded that "[e]ssentially, Baja Contractors Incorporated is an agent for Material Service Corporation." Id. On April 11, Baja's attorney was informed through a telephone conversation that it was doubtful that Baja's appeal would receive favorable treatment. Subsequently, Mr. Jaimes and Baja filed this suit seeking injunctive and declaratory relief as well as punitive damages on the ground that the City denied them due process of law in considering their application for MBE certification.

II

The District Court Opinion

On May 16, 1986, the district court issued a preliminary injunction restraining the City from inter alia, informing contractors that Baja was not certified as a concrete supplier under the MBE program. The

district court found that Baja was owned and controlled by a member of a minority group, Humberto Jaimes, and that this minority ownership was sufficient to qualify Baja for certification as an MBE under Executive Order 85-2. The district court further held that, in its application for MBE certification, Baja did not seek limited certification. The court found that, at the time of Baja's certification, there were no existing distinctions between concrete contractor and concrete suppliers. The district court therefore concluded that Baja's certification as a concrete contractor included certification as a concrete supplier.

Regarding the City's administration of its MBE program, the district court found that McNair Grant, then the Director of Contract Monitoring and Compliance for the City, retained the sole authority to grant MBE certification to applicants that he believed

were clearly entitled to receive certification. If Mr. Grant found that MBE certification was questionable, the application was then reviewed by the MBE Certification Committee. The district court found that the committee reached decisions on applications without "appropriate notice of the nature and scope of the proceedings." Tr. of May 14, 1986 at 19. The district court noted that the decisions were reached without the guidance of written procedures, ascertainable standards or a formal record.

The district court then applied the standards for granting a preliminary injunction to its findings of fact. The court stated that, in order to receive injunctive relief, Baja had the burden of showing that: 1) it had no adequate remedy at law, 2) it would suffer irreparable harm if the injunctive relief were denied, 3) the irreparable harm it would suffer if the

injunction were denied would be greater than the irreparable harm the defendant would suffer if the injunction were granted, 4) it had a reasonable likelihood of prevailing on the merits, and 5) the injunction would not harm the public interest.

The district court held that Baja had sustained its burden of showing that it was entitled to injunctive relief. First, the court determined that equitable relief was necessary because it would be difficult to calculate Baja's damages from the denial of MBE status and an award of damages would not prevent the loss of contract opportunities while the litigation was pending. Second, the court concluded that Baja would suffer irreparable harm absent injunctive relief because Baja would lose contracts to competitors that had received MBE certification. Third, in balancing the harms, the court noted that the City has an interest

in promoting the goals underlying the MBE program and in ensuring that the MBE program is properly administered.

In assessing the likelihood of success on the merits, the fourth requirement for injunctive relief, the court noted that it must analyze Baja's likelihood of establishing a deprivation of due process, not of establishing that it will ultimately be permitted to operate as an MBE concrete supplier. The court stated that for Baja to bring a successful due process claim, it must first be able to establish a property interest and then be able to show that the existing procedures were inadequate. The court found that Baja could establish the existence of a property interest in MBE certification as a concrete supplier in two ways: 1) the court found that Baja's initial certification as a concrete contractor included certification as a concrete supplier, and 2) the certification

provided Baja with a heightened opportunity to compete for City contracts.5/ After reviewing the City's procedures for considering certification applications, the district court concluded that they were inadequate because the unwritten procedures were constantly changing and decisions were made without appropriate notice of the scope of the proceedings. The court determined that the certification decisions were made without "properly formulated and announced standards or other implementing rules and regulations." Id. at 19-20. Therefore, the court concluded that there was a reasonable likelihood that Baja would be able to establish a violation of procedural due process.

5/ The district court found that Baja's heightened opportunity to receive contracts was illustrated by the fact that Anderson Construction issued two purchase orders to Baja conditioned upon Baja's receipt of MBE status.

Fifth, the court found that issuing an injunction to prevent the City from denying Baja procedural due process would serve the public interest by promoting the even-handed administration of the MBE program. Accordingly, the district court granted Baja's motion for a preliminary injunction.

III

Contentions of the Parties

A. Appellants' Argument

The focal point of the City's argument is that the district court erred in holding that Baja established a reasonable likelihood of success on the merits. The City contends that Baja did not possess a protected property interest in MBE certification as a concrete supplier. According to the City, the district court's finding that Baja's certification as a concrete contractor included certification as a concrete supplier is clearly erroneous

because Baja's initial MBE application described the nature of its business as a concrete contractor and the equipment it listed as owning on the application is equipment used by a concrete contractor, not a concrete supplier. Appellants' Br. at 22.

The City also contends that the district court's alternative ground for finding that Baja had a protected property interest in MBE certification as a concrete supplier was clearly erroneous. In finding a property interest, the court relied upon two purchase orders from the Robert P. Anderson Co. (Anderson Construction) issued to Baja that provided: "Fulfillment of the terms of this purchase order is dependent upon Baja receiving verification from the City of Chicago as a 100% MBE supplier." Appellants' Br. at 24-25. The City argues that a property interest cannot be contingent upon a future grant of certification, but must be based upon

a presently existing status or right. The City concludes that "[t]his attenuated 'right,' under recent Seventh Circuit law, does not rise to the level of a property right protected by the Fourteenth Amendment." Appellants' Br. at 25.

Even if Baja did possess a protected property interest in MBE certification as a concrete supplier, the City further disputes that Baja was deprived of due process when its application was denied. The City maintains that, because every specification for bids contained notification that the USDOT regulations published in 49 C.F.R. part 23 governed eligibility for the MBE program, Baja had notice of the standards that would be applied to evaluate its application. The City contends that Baja's application was denied because it could not demonstrate that it operated independently as a concrete supplier, rather than as a "front" for a non-minority

owned business. In support of this conclusion, the City emphasized that a non-minority owned company, Material Service Corp., supplied all of the aggregate material to produce the concrete and handled all of Baja's billing.

The City further maintains that the procedures it used to determine MBE eligibility satisfied the requirements of due process. The City claims that it has consistently applied the standards contained in the USDOT regulations since the inception of its MBE program. The City contends that, even though it's procedures were unwritten, the City reviewed both of Baja's applications according to the standard internal operating procedures and the applications received careful and thorough review. The City cites Brown v. Retirement Comm., 797 F.2d 521 (7th Cir. 1986), cert. denied, 107 S. Ct. 1311 (1987), for the proposition that "the proper

inquiry is not whether the internal operating practices were committed to writing, but whether the plaintiff actually received due process." Appellants' Br. at 29 (emphasis in original). The City further contends that Baja was not denied due process merely because the rules and regulations under the Executive Order were not promulgated but were in draft form. The City argues that until the rules were issued under the Executive Order, the USDOT regulations provided the applicable standards. Moreover, the City maintains that there was an adequate record of the proceedings to provide the basis for Baja's appeal to the USDOT of its denial of MBE certification. Specifically, the City contends that the record on appeal includes Baja's application for certification, corporate documents, two leases with Material Service Corp., income tax returns, the lease

for the concrete plant, the site reports and the denial letter.

Finally, the City contends that Baja has not satisfied its burden of showing that it could meet the other requirements for injunctive relief. The City claims that Baja has an adequate remedy at law because it could only identify an anticipated $17,000 loss of profit from three contracts denied because it lacked MBE certification as a concrete supplier. The City argues that Baja did not suffer irreparable harm because it did not show any lost contract opportunities and the most it would be entitled to recover for a deprivation of due process is nominal damages. The City further maintains that the grant of injunctive relief is more harmful to it and to the public than the denial of such relief would be to Baja because the integrity of the City's MBE program would be jeopardized if

Baja were serving as a "front" for non-minority owned businesses.

B. Appellees Argument

As did the appellants, the appellees first address whether the district court correctly determined that Baja has shown a likelihood of success on the merits. Baja contends that it has shown a reasonable likelihood of establishing a property interest. Baja maintains that, as a certified MBE, it would enjoy a significant advantage in competing for contracts because the MBE program creates a strong incentive for general contractors to utilize MBEs. Baja further contends that its loss of a contract with Anderson Construction after it had been denied MBE certification as a concrete supplier evidences that certification constitutes a beneficial property interest.

Baja also claims that the City's decision to categorize Baja as a concrete contractor but not as a concrete supplier was arbitrary. According to Baja, the City has no listing of MBE categories. Consequently, it argues that an MBE applicant must choose for itself an appropriate label when filing an application and the City is later free to interpret that label more narrowly than the applicant.

Baja also claims that the district court's decision that the city deprived Baja of procedural due process was correct. Baja contends that procedures comporting with due process require that an MBE applicant be provided meaningful notice and an opportunity to be heard before the City issues its final decision. Baja maintains that it was not notified of the City's Certification Committee meeting nor was it informed about the standards used by the committee to reach its decision. Baja contends that the City

administrators were confused as to whether the appropriate standards were contained in the USDOT regulations or in the Executive Order. Further, Baja claims that the record of the City's proceedings was inadequate. Baja also maintains that improving the procedures for reviewing MBE applications would not impose an unmanageable administrative burden upon the City. Baja also notes that the City failed to follow the procedures proscribed in its submission of its MBE program to the USDOT.

Baja concludes its argument by stating that it satisfied its burden of showing that it was likely to prevail on the remaining requirements for injunctive relief. Baja contends that it has no adequate remedy at law because any monetary damages would be awarded after Baja had lost business opportunities and Baja's damages would be difficult to calculate. Because of lost contract opportunities, Baja maintains that it would

suffer irreparable injury if injunctive relief were not granted. According to Baja, the district court properly balanced the potential harms to each party and correctly found that Baja would suffer a greater injury than the City if injunctive relief were denied.

IV

Analysis

A. Standard of Review

"In reviewing the decision of a district court to grant or deny a preliminary injunction, this court has continued to invoke the phrase 'abuse of discretion' in articulating the applicable standard." Darryl H. v. Coler, 801 F.2d 893, 897 (7th Cir. 1986); see also Chicago Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732, 735 (7th Cir. 1987). In deciding whether to afford injunctive relief, the district court must first make findings of fact and conclusions of

law, and then exercise its discretion to grant or deny the injunction. This court reviews the findings of fact under the clearly erroneous standard; legal conclusions are given de novo review. See Manbourne, Inc. v. Conrad, 796 F.2d 884, 887 (7th Cir. 1986); Lawson Prod., Inc. v. Avnet, Inc., 782 F.2d 1429, 1437 (7th Cir. 1986). "[A] factual or legal error may alone be sufficient to establish that the court 'abused its discretion' in making its final determination....However, in the absence of such an error the district judge's weighing and balancing of the equities should be disturbed on appeal only in the rarest of cases." Lawson Prod., 782 F.2d at 1437. However, while exercising his judgment, "the district judge must keep in mind that, while preliminary injunctions are an interlocutory form of relief, they are also 'an exercise of a very far-reaching power,' Warner Bros.

Pictures, Inc. v. Gittone, 110 F.2d 292, 293 (3d Cir. 1940) (per curiam), and, consequently, 'one in which the stakes are sufficiently high to make mistakes very costly.'" Darryl H., 801 F.2d at 898 (quoting Lawson Prod., 782 F.2d at 1433).6/ With

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6/ Because the stakes involved in deciding whether to issue injunctive relief are high, this court has stated that the district court must attempt to minimize errors.

> [T]he task for the district judge in deciding whether to grant or deny a motion for preliminary injunction is to minimize errors: the error of denying an injunction to one who will in fact (though no one can know this for sure) go on to win the case on the merits, and the error of granting an injunction to one who will go on to lose. The judge must try to avoid the error that is more costly in the circumstances. That cost is a function of the gravity of the error if it occurs and the probability that it will occur. The error of denying an injunction to someone whose legal rights have in fact been infringed is thus more costly the greater the magnitude of the harm that the plaintiff will incur from the denial and the greater the probability that his legal rights really have been infringed. And similarly the error of granting an injunction to someone whose legal rights will turn out

(footnote continued)

these principles in mind, we review the district court's grant of a preliminary injunction.

B. The Requirements for the Issuance of a Preliminary Injunction

As correctly stated by the parties and the district court, the plaintiff bears the burden of establishing five requirements necessary for the issuance of a preliminary injunction:

> (1) that it has no adequate remedy at law; (2) that it will suffer irreparable harm if the preliminary injunction is not issued; (3) that the irreparable harm it will suffer if the preliminary injunction is not granted outweighs the irreparable harm the defendant will suffer if the injunction is granted; (4) that it has a reasonable likelihood of prevailing on

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> not to have been infringed is more costly the greater the magnitude of the harm to the defendant from the injunction and the smaller the likelihood that the plaintiff's rights really have been infringed.
>
> Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 388 (7th Cir. 1984).

the merits; and (5) that the injunction will not harm the public interest.

Manbourne, Inc., 796 F.2d at 887; Brunswick Corp. v. Jones, 784 F.2d 271, 273-74 (7th Cir. 1986). In this appeal, the district court and the parties have focused primarily on the requirement that Baja demonstrate a reasonable likelihood of success on the merits. We also believe that this element is the pivotal factor and therefore shall discuss it first.7/

7/ Although the parties did not raise this issue, we consider whether Baja failed to exhaust the available administrative remedies before filing for injunctive relief. Generally, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). However, the exhaustion requirement is "not inflexible, and must be applied with an understanding of its purposes and of the particular administrative scheme involved." Atlantic Richfield Co. v. United States Dep't of Energy, 769 F.2d 771, 781 (D.C. Cir. 1984). "[W]hen resort to the agency would in all likelihood be futile, the cause of overall efficiency will not be served by postponing judicial review, and the exhaustion requirement need not be

(footnote continued)

1. Likelihood of Success on the Merits

To establish a due process violation, Baja must show: "(1) a protected property or liberty interest, and (2) that [it] was

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applied." Id. at 782.

In this case, Baja filed an appeal from the City's decision to the USDOT, but as of the date Baja filed for injunctive relief, the agency had not issued its decision on the appeal. Exhaustion is not required in this case, however, because it would be futile. First, a favorable decision on appeal to the USDOT would afford relief only for federally-funded contracts. As the section-by-section analysis of the USDOT regulations states, "once a recipient has made a final decision on certification, that determination goes into effect immediately with respect to the recipient's DOT-assisted contracts (see § 23.53(g))." 49 C.F.R. part 23, subpart D, app. A, at 150 (1986) (emphasis supplied). A favorable decision from the USDOT would not provide relief for contracts funded only by the City. See Interstate Material Corp. v. City of Chicago, 501 N.E.2d 910, 917 (Ill. App. Ct. 1986).

Further, an appeal to the USDOT would provide inadequate relief because the USDOT would not be able to stay the City's decision while the appeal was pending. The section-by-section analysis

(footnote continued)

deprived of that interest by government action and without due process of law." Cunningham v. Adams, 808 F.2d 815, 820 (11th Cir. 1987).

a. Property Interest

To establish that the City has violated its fourteenth amendment due process rights, Baja must first demonstrate that the City has

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of the USDOT regulations provides that:

> If a firm that has been denied certification or has been decertified appeals the recipient's action to the Department under § 23.55...the recipient's action remains in effect until and unless the Department makes a determination under § 23.55 reversing the recipient's action. The recipient's action is not stayed during the pendency [sic] of a § 23.55 appeal.
>
> 49 C.F.R. part 23, subpart D, app. A, at 150 (1986). Further, the regulations provide no time limitations during which the USDOT must issue its decision on the appeal. The appeal to the USDOT therefore provides inadequate relief because Baja would be denied MBE status and lose the concomitant advantage in competing for contracts for an indefinite period of time. Accordingly, we conclude that exhaustion is not required in this situation.

deprived it of a property interest. The question of whether an individual has a property interest in a government benefit depends upon whether the person is entitled to that benefit. As the Supreme Court stated in Board of Regents v. Roth, 408 U.S. 564 (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than an unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it...Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577; see also Reed v. Village of Shorewood, 704 F.2d 943, 948 (7th Cir. 1983) ("[P]roperty is what is securely and durably yours under state...law, as distinct from what you hold subject to so many conditions as to

make your interest meager, transitory, or uncertain.").8/

Applying this analytical framework to the facts of this case, we must now decide whether the district court correctly decided that Baja has shown a reasonable likelihood of establishing a property interest in MBE certification as a concrete supplier. The City's action in denying Baja MBE certification as a concrete supplier can be viewed in two ways: 1) as a more restrictive interpretation of its earlier grant of a

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8/ According to this concept of a property interest:

> [T]he applicable federal, state or local law which governs the dispensation of the benefit must define the interest in such a way that the individual should continue to receive it under the terms of the law. This concept also seems to include a requirement that the person already has received the benefit or at least had a previously recognized claim of entitlement.
>
> 2 R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law § 17.5, at 235 (1986).

general certification as an MBE, in effect, a partial decertification, or 2) as a denial of an application for certification under a different classification (concrete supplier as opposed to concrete contractor), in effect, a denial of a new benefit. The district court concluded that the first option was the correct one and that the City's actions were more appropriately characterized as a more restrictive interpretation of the earlier grant of certification. The district court found that, in initially applying for MBE certification, Baja "did not...seek limited certification." Tr. of May 14, 1986 at 8. Further, the court found that there were no "water-tight compartments existing between concrete contractor and concrete supplier" and that the City's efforts to "dredge such water-tight compartments out of 49 CFR, Part 23 and the Small Business Administration Regulations are a kind of distortion of those

documents, as well as of the place that those documents played and currently play in the certification structure and procedures." Id. The court concluded that "the City's later effort to limit the scope of the certification would constitute a deprivation of [Baja's] property interest." Id. at 15.

We cannot say that the district court abused its discretion in reaching this conclusion. To the extent that its conclusion is based on a factual determination as to the nature and extent of Baja's original application, its finding is not clearly erroneous. While the regulations are far from models of clarity and specificity, we cannot say, on the basis of our own study of those provisions, that the district court has misread them. Neither the USDOT regulations nor the Executive Order contain a list of certification classifications. While the City's Directory of Minority Business

Enterprises labels each business according to its field of work, the absence of any provision in the USDOT regulations or in the Executive Order stating that MBE certification is limited to a particular line of work supports the district court's conclusion that MBE certification is not restricted in such a manner.9/

9/ The district court's finding that there was no written descriptions of various job classifications is supported by the testimony of Mr. Spieles, the City's Director of Contract Compliance.

> Q. [Attorney] Do you know whether there's a difference between being a concrete contractor and a concrete supplier?
>
> A. [Mr. Spieles] Yes, I do.
>
> Q. How do you know the difference? What's the foundation for your knowledge that there is a difference?
>
> A. I know what a concrete contractor does and I know what a concrete supplier does.
>
> * * * *
>
> Q. How do you know the difference between a concrete contractor and a

(footnote continued)

Baja therefore has established a likelihood of showing that it has a protected property interest in MBE certification because

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concrete supplier?

A. I have reviewed a number of applications from a number of businesses in - who are concrete contractors. I've also reviewed a number of applications from concrete suppliers.

Tr. of May 5, 1986 at 53-54. Further, Mr. Spieles testified on cross-examination that the label applied to an MBE in the City's Directory describing its field of work is not selected from a comprehensive list of job classifications, but is provided after the business has been certified.

Q. And the categories that are included in that particular directory, those categories are not set up prior to the applicant's certification; isn't that correct?

A. That's correct.

Q. For example, when a minority business enterprise applicant comes to the certification committee or to the Director of Purchasing and asked to be classified under the category Diversified Industrial, Commercial and Public Works, that wasn't a category that was set up before certification; it that right?

(footnote continued)

the City had already conferred that benefit upon it.

b. What Process is Due

(footnote continued from previous page)
A. That's correct.

Tr. of May 5, 1986 at 92-93.

Further, the regulations and Executive Order do not vest the City with wide discretion in revoking MBE certification.

The City's program rules indicate to MBEs that they are entitled to the continuation of MBE certification so long as the firm continues to satisfy the City's uniform, enumerated standards. The Executive Order which establishes the City's MBE program sets forth specific criteria for MBE certification. (See City of Chicago Executive Order 85-2, sec. 1(b) (April 3, 1985); see also 49 C.F.R. sec 23.53 (1985).) Once MBE certification is conferred by the City, this certification remains in full force and effect for an indefinite period of time, provided the firm continues to satisfy the City's specified criteria of what constitutes a "minority business enterprise." (See City of Chicago Executive Order 85-2, sec. 5(e) (April 3, 1985); see also 49 C.F.R. secs. 23.51, 23.53 (1985).)

Interstate Material Corp., 501 N.E.2d at 915.

The government may not deny a property interest without first giving the putative beneficiary an opportunity to present his claim of entitlement. "[I]t has become a truism that 'some form of hearing' is required before the owner is finally deprived of a protected property interest." Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982) (quoting Board of Regents, 408 U.S. at 570-71 n.8) (emphasis in original). "[W]hat is fundamentally fair in terms of the form and time of the notice and hearing must of necessity depend on circumstances that will vary from case to case." Signet Constr. Corp. v. Borg, 775 F.2d 486, 490 (2d Cir. 1985). "In general, something less than a full evidentiary hearing is sufficient prior to adverse administrative action." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545 (1985).

We begin by noting the limited, indeed focused, inquiry before us. Our task is not to determine whether the entire MBE review process employed by the City affords all businesses due process in all aspects of the administration of the program. Rather, our task is to determine whether, in the particular posture of this case, Baja was afforded due process when the City proposed to limit its MBE certification so as to exclude its operation as a concrete supplier.

Our review of the record reveals that Baja's application for certification as a concrete supplier (which, as we have noted above, amounted to an application to prevent partial decertification as an MBE) provided many of the procedural protections usually required before the loss of a protected property interest. The application that Baja completed specifically notified it that the provisions of 49 C.F.R. part 23 governed. See

R.1, Ex. D at 2.[10/] Those regulations, as we have noted above, specifically alerted the contractor that it could not function as a front for a non-minority business and still receive MBE certification. The Executive Order, while not as precise, contained the same requirement. Moreover, as we have already noted, Mr. Triplett, the City's on-site inspector, indicated to Baja that he was inspecting the site at O'Hare to determine

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10/ The instructions at the top of the certification application, schedule A, provided:

> Please fill out the form completely, the extensive information required is necessary to determine applicant's eligibility as a small business owned at least 51% by women or minorities (Black Americans [B] Hispanic Americans [H], Native Americans [N], Asian Americans [A]), or any other individuals found to be disadvantaged under the Small Business Act, and whose management and daily operation is controlled by such individuals (See 49 CFR Part 23.)
>
> R. 1, Ex. D at 2.

whether Mr. Jaimes was running the operation himself. See Tr. of May 1, 1986 at 30.

The MBE Certification Committee reviewed Baja's application in early September 1985. During this meeting, the committee reviewed documents submitted by Baja and heard an oral report of the site inspection. The lease agreements submitted by Baja as part of its application indicated that the mixing plant and delivery trucks were leased on terms that prohibited their removal from the job site. Baja did renegotiate its lease with Material Service Corp. for the leasing of "redi-mix" trucks while its application with the City was pending. Unlike the earlier leases, this lease did not require the trucks to be used only at the O'Hare job site. The job site report indicated that Poulos supplied Baja with three of its workers and that a consultant from Material Service Corp. was in charge of quality control. After discussion,

the committee voted unanimously to deny certification to Baja as a concrete supplier.

Baja was then notified of the committee's decision and the reason for the decision:

> Your application and supporting documents does [sic] not indicate that your firm is an independently operated business. Relevant factors include the reliance upon Pavlos [sic] and Sons, Inc. and Material Service Corp. for personnel, technical assistance, leasing of concrete plant and equipment.

R.1, Ex. E.

Moreover, after this negative decision, Baja, through its attorney, had an opportunity to discuss the reasons for the denial and was afforded an opportunity to submit to City officials additional information. Indeed, on March 10, 1986, Baja's attorney filed a formal appeal with the City from the denial of certification. This request was granted by the City's Purchasing Agent. On March 24, 1986, Mr. Jaimes and Baja's attorney met with Mr. Grant, the City's Assistant Purchasing Agent, regarding Baja's appeal. At this

meeting, Mr. Grant discussed the ownership of Baja's trucks, the source of the materials used to manufacture concrete and the number and ethnic background of Baja's employees. The reasons for the denial of the application as set forth in the September 9 letter also were discussed. Mr. Grant requested the submission of additional documents from Baja and stated that a second site visit would be scheduled. Tr. of May 2, 1986 at 65-66.

Mr. Wheaton, a compliance officer and an accountant, visited the work site during the week of April 7, 1986 and also reviewed Baja's purchase orders, invoices, tax returns, and billing practices. Mr. Wheaton also toured Baja's facilities and orally communicated his report to Mr. Bannister, the City's First Deputy Purchasing Agent (the report was later committed to writing). The report stated that Material Service Corp. served as the major source of materials purchased by Baja, that

Material Service Corp. provided invoicing, billing, computerized invoice receipts and truck leasing services to Baja at no apparent cost, and that a Material Service Corp. employee mixed the raw materials. Mr. Wheaton concluded that Baja was an agent for Material Service Corp. Subsequently, Baja's attorney was informed in a telephone conversation that it was unlikely that Baja's request for reconsideration would receive favorable treatment because no new material facts had been submitted since the application had been considered in September 1985.

In Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court established the basic analysis to be employed in determining, in terms of procedural due process, the adequacy of the administrative procedures employed by the government. Under Mathews, a court must assess the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of

> such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335; see also Brown v. McGarr, 774 F.2d 777, 785 (7th Cir. 1985).

Here, Baja's interest in certification as an MBE is substantial because of the increased potential for contract awards that MBE certification allows. Certainly, once granted, MBE certification is a valuable business asset. It gives the holder of the certification a significant competitive advantage in the market of government contracts. As noted by the Illinois Appellate Court in Interstate Material Corp., 501 N.E.2d at 916, "MBE certification is an extremely important asset to a minority business, and it is questionable whether a minority enterprise would be able to remain a viable competitor in its industry, if MBE certification is revoked.

The City's interest lies in ensuring that the businesses certified actually qualify for MBE status and are not serving as fronts for other non-minority owned corporations. Rather than competing, the potential MBE's interest and the City's interest converge, provided that the business actually satisfies the criteria for certification as an MBE. If the company is owned and operated by a member of a minority group, then it is in both the firm's interest and the City's interest for it to receive certification as an MBE to promote the goals underlying the MBE program. In this sense, both the applicant and the City would benefit from adequate procedures to ensure that bona fide MBEs receive certification and that MBEs serving as fronts are denied certification.

We believe that the City's procedures, as applied in this case, afforded Baja adequate protection against the risk of an erroneous

deprivation of its property interest. From the beginning, Baja was on notice that, to function as an MBE, it could not operate as a front for a non-minority business. It had an opportunity, during the application process, to present evidence to show independent ownership and control. Indeed, at one point in the process, the City's on-site inspector, Mr. Triplett, specifically focused Baja's attention on this requirement. Baja was also informed, in no uncertain terms, of the reason for the City's action and was then given an opportunity to supply additional information. Under these circumstances, we cannot say that the procedures employed by the City presented, with respect to the issue of whether Baja was a front for a non-minority business, a significant risk of error.

We understand that the City's MBE review process, when viewed in its totality, was hardly the model of a well-constructed

administrative process. The district court was of the view that some of the substantive criteria for evaluating applications were not well-established. The district court found that: "What's painfully clear from the testimony is that the rules, if they can be called that, are changing on a continuing basis. They are sort of being made up as the defendants go along." Tr. of May 14, 1986 at 16-17. While there is some indication in the record that, in the absence of rules promulgated under the Executive Order, the City applied the criteria contained in the federal regulations, see, e.g., tr. of May 5, 1986 at 185, the district court determined "that the Executive Order did not incorporate, as is now claimed, 49 CFR Part 23, as its rules and regulations. And...the Executive Order required rules and regulations under its paragraph 3(i)." Id at 18.

We need not determine, in any definitive way, whether the record supports these conclusions even under the highly deferential standard which we employ in reviewing factual findings. See Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985); Gianukos v. Loeb Rhodes & Co., 822 F.2d 648, 652 (7th Cir. 1987). Rather, in our view, it is simply unnecessary, in this litigation, to address in such broad fashion the adequacy of all of the City's procedures. It is sufficient to determine that, with respect to whether Baja was operating as a front, the procedures employed were adequate to satisfy the demands of due process. Since the course followed by the City authorities in this case adequately reconciled the private and public interests involved and reduced to a minimum the possibility of an erroneous deprivation of Baja's property interest, the mandate of Mathews has been met.

Conclusion

Because Baja was not deprived of due process of law by the action of the government, it was not entitled to a preliminary injunction. Accordingly, the judgment of the district court is reversed.

REVERSED

A true Copy:

Teste:

.....
Clerk of the United States Court
of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES CIRCUIT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BAJA CONTRACTORS, INC, et al.,	) Docket No. 86 C 2655
Plaintiffs,	)
vs.	)
THE CITY OF CHICAGO, et al.,	) Chicago, Illinois May 14, 1986 4:00 o'clock p.m.
Defendants.	)

TRANSCRIPTS OF PROCEEDINGS
BEFORE THE HONORABLE
MILTON I. SHADUR, JUDGE

APPEARANCES:

For the Plaintiffs:

MR. MICHAEL J. DALEY and
MR. GREGORY WARD

For the Defendants:

MR. ROGER PASCAL and
MR. FREDERICK R. KLEIN

JESSE ANDREWS
Official Court Reporter -
U.S. District Court
219 S. Dearborn Street
Chicago, Illinois 60604
(312) 922-5955

THE COURT: (2)*

* * *

Baja Contractors, Inc., whom I will refer throughout here as Baja with its principal owner Humberto Jaimes, charged the City of Chicago -- and of course, I will just use the term City, and various of its administrative personnel -- with

having violated the constitutional (3)
rights of the plaintiffs to due process of law in connection with the denial of continued certification as a minority business enterprise -- I will be consistent with what the parties have done in those terms and use the term MBE for that purpose -- for the purposes of participation in City contracts, so as to give what is important MBE credit to the general contractors with whom Baja has

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* Parenthetical references are to the actual transcript page numbers.

contracted and would have the opportunity to be given MBE status.

This case has been operating under a temporary restraining order originally issued April 18, after a preliminary hearing and then further extended after we had completed the evidentiary hearing for a preliminary injunction in order to enable this Court to consider and then rule on that subject; and the TRO at this point is going to be running out, I think, at 5:00 o'clock tomorrow, if I'm not mistaken, 5:00 o'clock May 15.

Now this Court has conducted a full evidentiary hearing on the application for preliminary injunction under Federal Rules of Civil Procedure 65(a) and has received post-hearing memoranda from the litigants. I had also received a memorandum from the defendants at the close of the plaintiffs' case in opposition in granting of preliminary injunction and basically that was then

supplemented by Mr. Klein's further memorandum that was delivered on the schedule that we talked about. (4)

Because as I said at the outset, it has not been possible for me to prepare written findings of fact and conclusions of law, the oral statement that I have begun and that I will continue to completion this afternoon is going to constitute the finding and conclusions in accordance with Rule 52(a), and because of the familiar phenomenon that the line between findings of fact and conclusions of law is not always a precise one, it should be made clear at the outset and I do make this determination that if, and to the extent that anything that is stated as finding of fact may constitute a conclusion of law, it shall be deemed such; and the converse determination that if and to the extent that there is anything that is stated as a conclusion of law

that draws upon findings of fact, it shall be deemed that as well.

Let me turn first to some findings of fact about identifying the standards that have to be met in order for a plaintiff to obtain preliminary injunctive relief, and to whether or not Baja has met those standards.

At the outset it should be noted that the defendants have challenged the right of Jaimes individually as distinct from Baja in its corporate capacity, to assert due process violations.

Plaintiffs really have not responded to that at all. There has been no indication that he is his individual capacity as contrasted with his position as the (5) majority owner of Baja, has standing in that respect. And certainly the defendants' position appears sound in legal principle.

Accordingly all of the findings and conclusions that I'm going to be dealing with are going to focus on Baja itself.

On other purely procedural point, but recurring one in litigation that we encounter in this court, both the complaint and the just filed answer to the complaint, purport to be verified. But all of the claimed verifications read in one form or another and I will just pick up the defendants' because it is the most recent, not because it's different.

The defendants so-called called verifications say that someone, a defendant, verified under penalty of perjury, under laws of the United States of America, "To the best of my knowledge and belief the matter stated in the foregoing verified answer is true and correct."

And just so it's even-handed, the affidavit at the end of the complaint, by Mr.

Jaimes, says that he has knowledge of the matters stated in the complaint and that the matters stated in the complaint are true to the best of his knowledge and belief.

Now that's -- that's just not acceptable, though it is seen, I must confess, all too frequently. How does the reader know what's known and what's believed? And if it is the latter, how does the reader know what the (6) basis for the belief is?

That is, in all candor, kind of sloppy practice. It's a thriving development of impermissible usage and if witnesses were not available to testify, that kind of so-called verification could and ought to preclude relief based on a pleading.

Now, having said that, because we have testimony, we are in the ballpark; so let me deal with this.

First of all, this Court plainly has subject matter jurisdiction under both 28 USC

Section 1331, that is, that general Federal Question Jurisdictional Grant; and 1343, the grant of jurisdiction over civil rights actions in this case charging constitutional violations. That's something that is both asserted and, at least to the extent of the 1343, is admitted in the answer to Paragraph 2 of the complaint. I assume that the reason for not admitting the first one is that Paragraph 2 has a misprint and said 1341 instead of 1331. In any case, jurisdiction is here.

Next the facts plainly establish that Baja is a minority owned. The defendants have sought somewhat to muddy the waters by raising questions as to bona fides in this respect; but this Court finds that the majority ownership and control -- and it's management and daily operations are, in fact, in Jaimes, who is a Hispanic individual, born in Mexico who is in this country legally; and the (7)

evidence as indicated a veteran of military service in the United States Armed Forces.

That ownership and control and that management and daily operation are sufficient to qualify Baja for certification as an MBE under Executive Order 85-2, which I will simply call the Executive Order issued by Mayor Harold Washington in April of last year, almost, just a little over 13 months ago.

Indeed, defendants have continued and during the hearing confirmed the continuation of certification as an MBE although, on a more limited basis, they say that the plaintiffs would want -- so that I do not understand that. That is really in issue, and that ownership and control and management and daily operation were sufficient to qualify Baja for certification as a Disadvantage Business Enterprise, a broader term that includes the MBE under the certification application system that existed before April, '85. That is

before the Executive Order to establish eligibility for fulfillment of DBE requirements on City contracts financed by the United States Department of Transportation and other City contracts.

Baja, as I have indicated, was in fact certified by the City as an MBE-DBE on February 28, 1985 under Plaintiffs' Exhibit 3.

Several findings of significance to this action are made in that respect. First of all, the application by Baja for - that led to that certification -- (8) that's Plaintiffs' Exhibit 2, the Schedule A Affidavit of Minority Business Enterprise, which this Court finds to have been truthful in all respects, sought certification as an MBE-DBE. That's indeed the way the form was structured.

It did not in terms seek limited certification. In response to the question about the nature of the firm's business, it is

correct that it said concrete contractor, but that doesn't carry with it some notion by definition of limited certification as a request.

And I will get to that in more detail further on.

The defendants' hindsight construction, that is, perhaps more accurately a proposed construction of sort of water-tight compartments existing between concrete contractor and concrete supplier, doesn't find any basis in any announced classifications; there were none such. And the defendants present efforts in the context of this litigation to dredge such water-tight compartments out of 49 CFR, Part 23; and the Small Business Administration Regulations are a kind of distortion of those documents, as well as of the place that those documents played and currently play in the certification structure and procedures.

It is certainly true, as I mentioned a couple of minutes ago, that Plaintiffs' Exhibit 2 reflected the nature of the firms business as concrete contractor. But there are some
significant factors that have been (9)
glossed over here by the defendants.

First, you know the application. Although this is not a critical item, specifically identified that this was for the United Airlines Terminal Project. But more importantly, in addition to Paragraph 17 of this application, that listed the type and quantity of equipment owned by Baja and it listed in that, what we now call and now refer to, as concrete contracting equipment; and it would admittedly not permit performance of what is now in hindsight, called the more expansive function of concrete supplier.

Well, let me pause on that one. This equipment listed in Paragraph 17 would permit

what we are -- what I am going to be terminating for purposes of these findings, concrete contracting, in the sense of a basically service enterprise, that is one of forming and finishing of concrete work. And I am going to use, but simply because that's been the locution used in this proceedings, not because it has controlling relevance in this lawsuit, the term concrete supplier to talk about the - manufacture and sale of the product, as well as that of servicing.

But what the defendants have not adverted to, and I think somewhat surprisingly, is the fact that this same application in its response to Paragraph 20 identify -- and, by the way, something I guess ignored in the course of
cross-examination on that score -- (10)
specifically said, as one of the material facts of additional information, Baja Contractors Inc., has lease arrangements with

P. J. Poulos for a central mix concrete plant with all accessory items.

You know that clearly and really unequivocally if the present distinction were to be treated as relevant, spoke to the supplying of concrete and to Baja's capacity to do so. And in an important sense giving the lie to the kinds of bright line hindsight distinction that the defendants now advance that certification as a concrete contractor was perceived as a narrow concept that excluded concrete supply. That factor renders, I find, misleading the statement in the defendants' supplemental memorandum -- let me get my hands on it -- yes.

At page 10, which talks about the examination of Mr. Agnos and his awareness that the content of this initial application and it refers, of course, to the owned equipment, would not enable Baja to function as a concrete supplier due to the material

differences between performing as concrete contractor and concrete supplier.

Defendants cannot somehow, at this point, shift the facts as thought here were a regularized, structured procedure with defined categories for certification. There were not, and this is an aspect of the procedure -- or I could more accurately -- lack of procedure that gives rise to Baja's due process claims.

In that respect there is no basis, (11) either for arguing that Baja somehow sought to mislead, as to what it proposed to do. Were its application really solely for what's now called concrete construction, that is, this narrow service term, the existence of a ready-mix batch plant would have been just as irrelevant to Baja's application as if it were to disclose that it owned, for example, a greenhouse.

So that the idea of inclusion of that fact in the application is something that

bears both on bona fides and alos on the significance that's to be attached to these documents.

Now, when the City, consistently with the application certified Baja, what it said, and that's again Plaintiffs' Exhibit 3, is the result of our review of submissions is that Baja Contractors Inc., is here to -- hereby certified as a Disadvantaged Business Enterprise eligible to fulfill DBE requirements on City contracts financed by the US Department of Transportation, and on other City contracts. Then went on to say your speciality will be listed in our DBE directory as concrete contractor.

That's a -- I must say an odd locution, if the intention were as to express some kind of narrow categorization or compartmentalization terms of the limit of the kind of certification that's involved.

Now, lest this Court be misunderstood as having created its own reconstruction of the facts, as the defendants
clearly seek to do here, that is, (12)
reshaping the facts to suit what are their current legal theories; it's important to call attention do some other factual findings that are supported by the record.

Whenever anybody tries to engage in revisionist history as, I believe, the defendants now do, the best antidote is to look at contemporary conduct and not what lawyers or the parties engage in, in terms of a kind of post hoc reconstruction of events and there significance. That kind of contemporary evidence is the best evidence of what really occurred and what the real meaning and understanding of events is, or was.

In this case we have very strong evidence, indeed the strongest kind of corroborative evidence, that is, something

coming from a third party against something that's not really focused on about the defendants here.

Defendants' Exhibit, although it's their exhibit, Defendants' Exhibit 22, which is the contract with Turner Construction Company, a sophisticated, major general contractor, which because the general contractor at the new terminal facility for O'Hare, is extraordinarily relevant here.

Just look at the contemporaneous reading and understanding of the situation and status by Turner in that document.

What it did was to grant a subcontract to Baja for
the Central Mix Plant for the purpose of (13) furnishing ready-mix concrete. And it went on at lengths in terms of the description of the nature of the contract to make it plain, that's what was bargained for. It included as part of that contract that it negotiated,

something that I think is probably a misprint -- I shouldn't say misprint -- it's a mistrike in terms of how it was supposed to have been said. Paragraph 8 says subcontractor presents. My judgment is that that was probably intended to say represents. He is a City of Chicago Certified Disadvantaged Business Enterprise, MBE, as evidenced by the attached letter, dated February 28, 1985, from the City of Chicago.

And, of course, that attached letter is precisely the same exhibit that I had referred to earlier as having been issued by the City, that's Plaintiffs' Exhibit 3.

Now no such narrow reading as the -- of the certification as the defendants now advance, was given by this experienced and knowledgable contractor in proceeding to let the $10 million subcontract to Baja, based on its broader reading of the, of the

certification as including a certification and approval to supply concrete.

That has the potential, certainly at this preliminary stage, for being powerful evidence indeed. And that, coupled with the absence of the kinds of distinction that are now urged by the defendants, leads this Court to find that there is, at

least, a substantial, highly reasonable (14) likelihood of success of a finding that the original certificate of Baja as an MBE included the potential for the supplying of concrete, and that it was not some kind of parsed out or divided certification.

Significantly, that helps to explain something else that defendants really kind of gloss over in the current proceedings.

They have not sought to disturb the Turner subcontract, and Baja's performance of it and Baja's MBE status under that subcontract and the Turner general contract.

And in an important sense, you know, that's logically inconsistent with their present position. And although I -- I don't mean to lean totally on that, it's odd indeed that if the original scope of certification was an inappropriate one that with knowledge of how the thing was set up, the defendants are prepared, and continue to be prepared, to recognize it.

Now what all this means and what this Court finds, is again that the City's February, 1985 certification extended, as it said, to MBE status. It was not by its terms limited to what is now sought to be the kind of more restricted meaning.

Again, it's unnecessary to find that as an ultimate matter in this action, because at the very lease Baja has demonstrated a reasonable likelihood of success in establishing that.

And that has an extremely important corollary, and that is, that the (15) necessary property interest for due process showing would exist by reason of the certification, so that the City's later effort to limit the scope of the certification would constitute a deprivation of that property interest.

Accordingly, what follows from that is that Baja has shown, at least a reasonable likelihood of success in establishing the existence of a present property interest in those terms of the deprivation of which, of course, due process must be afforded.

Even were that not the case, however, Baja's two contracts with the Robert R. Anderson Company, Plaintiff's Exhibit 12 and 13, would also establish necessary property interest.

Under the evidence and under those exhibits, another party has, in fact,

confirmed its readiness to deal with Baja, conditioned on it's MBE certification.

And indeed, had confirmed that by a firm agreement. And the evidence confirms as well that still others were prepared to do that but that Baja was blocked from those contracts by the absence of certification.

One other thing that's also relevant in this area in kind of odd way, I guess -- I will get do that a bit later -- is the fact that the City has not certified any other MBE for the supplying of concrete, a factor that is additionally relevant as I say, and I will treat with breifly later on, I guess, to the defendants' attempted (16) invocation of the Eidson, that's, E-i-d-s-o-n, well the Eidson against Pierce, P-i-e-r-c-e, case.

This Court, therefore, finds that Baja has demonstrated an additional reasonable likelihood of success on this alternative or

added showing of a due process protectible property interest.

Now, when the City later told Baja that its existing certification was insufficient, Baja sought to comply. Discretion was plainly the better part of valor in that circumstance. It tendered an added application, this one labeled as requested for concrete supplier; and, it furnished documents, as and when those were requested.

But the ground rules for that later determination were never really provided to it. If any doubt were to exist on that score, it would clearly have been dispelled by the inability of the defendants themselves to articulate the standards and procedures and where they could be found.

It's really unnecessary, I think, to particularize in that respect; but it's worth noting just, for example, that Plaintiffs'

Exhibit 5, the turn-down letter says: The decision of the City of Chicago is final.

Later, of course, Baja's lawyers told that's not so. Reconsideration is possible.

What's painfully clean from the testimony is that the

rules, if they can be called that, are (17) changing on a continuing basis. They are sort of being made up as the defendants go along.

We have a situation in which proposed rules have been in draft form since late '85, that I think, Ms. Skipton testified to that, if I recall correctly, and that those things have never been promulgated. That failure to general rules and regulations which are flatly called for by the Executive Order, has been the deliberate product of a decision to postpone that action in order to deal with existing applications.

But that kind of resource allocation can't supplant due process. If due process

requires rules and regulations and procedures -- and, I find that it does, and I will get to that later on -- and it's really the City's responsibility to assign somebody to do both things; and not make the kind of choice that they have made here.

Mr. Bannister's testimony set out that -- you know, he set up the kind of set of priorities, after having conferred with then Corporation Counsel Montgomery, that they were under time pressure (sic.) to assure compliance; he know of the requirement and the request for rules and regulations; but the underlying judgment was: Well, maybe we know what they are, although we haven't told anybody what they are, and therefore let's deal with the applications as they come in.

In somewhat the same way, Mr. (18) Grant's testimony is that the procedure is an unwritten one. He refers to it as procedure; but, that he learned about it through somebody

telling him, you know, essentially that the thing growed like Topsy and got handed down orally.

Like most folklore and oral history, that's the stuff of which legends are made, but it is not the source of fair and regularized standards that due process requires.

Specifically, it's, found based on the testimony, that the -- that the Executive Order did not incorporate, as is now claimed, 49CFR Part 23, as its rules and regulations. And, as I said, the Executive Order required rules and regulations under its paragraph 3-I.

Mr. Spieles testified, during the deposition that the Executive Order took the place of 49 CFR. Mr. Spieles, of course is a lawyer, knowledgeable in terms of technical and due process oriented terms. And, I would not discredit his testimony in that respect. It's also plain that the references elsewhere

to the Federal Regulations did not have the same thrust, the same effect, as the adoption of rules and regulations. And that portions of the Federal Register now relied upon by the defendants for the kind of categorization, the kind of differentiation of MBE's that they urge, do not fairly provide notice of those matters to applicants in the necessary way or a fortiori, do they provide notice of the bases for decertification as a part of (19) what a certified MBE is already fairly authorized to do.

In summary, and deleting from it, what I would consider the somewhat argumentative and maybe perjorative characterizations, the brief factual background stated in Baja's memorandum in support, is accurate. And I do find this, quoting in part from theirs, but as I say taking out some of the loaded aspects which are part of permissible advocacy. The City's MBE certification procedures are amorphous.

No written procedures exist under which defendants can determine the faith of an MBE candidate's application on any consistent status.

A single individual in the City Administration, Defendant McNair Grant, has the authority to bestow MBE certification to applicants he considers to be clear-cut.

If grant and Grant alone decides (sic.) there is a problem with any application, that application is put before a committee of City employees. With respect to the applications presented to that committee, the decisions are reached without -- and I -- it would be an overstatement to say without notice -- but the -- but it is without appropriate notice of the nature and scope of the proceedings. They are certainly provided without written procedures; they are done without a formal record, although I would not find that a formal record in the evidentiary hearings sense is required;

but, importantly, they are done without properly formulated and announced standards or other implementing rules and regulations. (20) Were any doubt to exists on that score -- and I would suggest that there is none -- an instructive and compelling inquiry might be made in terms of the City's action of partial decertification, if we take the one reasonably likely view of the evidence that I have outlined earlier, or denial of certification under the other reasonably likely view.

As I mentioned, Plaintiffs' Exhibit 5 tells Baja that the City's decision is final; but that it can be appealed to the United States Department of Transportation.

In that respect, as all of us know, such an appeal is guaranteed by 49 CFR, at Section 23,55.

But, what's the record on such an appeal? Is it de novo? Some idea of the predicate for

ruling was given in the prior paragraph of Plaintiffs' Exhibit 5, but in terms of operative standards it would be, I think, a fair, although embarassing challenge to the highly competent counsel for defendants to try, if they were on the other side of the fence, to device an effective and articulate basis for grappling with the problem of knowing just what had to be dealt with; just what had to be overcome.

It would, I think be unfair and hyperbolic of me were I to find the situation redolent of Kafka's trial; it is spared of being truly Kafkaesque by the somewhat amorphous statement in Plaintiffs' Exhibit 5, but it certainly does not provide the necessary information that is required (21) for someone to cope with that kind of an adverse finding.

Let me then turn to the applicable standards for preliminary injunctive relief.

With any further findings that I will be making, to be made in the context of those as a backdrop.

Though our Court of Appeals hasn't always been entirely consistent in its statement of those standards, certainly the developments, post Roland Machinery, that's in 749 Federal 2d, someplace or other, have pretty well shaken down to the expression by Judge Eschbach in Brunswick Corporation against Jones, which I cite in the TRO as entered, that's 784 Fed. 2d, 271, at pages 273 to 274.

It's clear now that we have 5, although it used to be often called 4, standards. They are all the burden of a plaintiff; that it has no adequate remedy at law; that it will suffer irreparable harm if the preliminary injunction is not issued; that the irreparable harm it will suffer if the preliminary injunction is not granted is greater than the irreparable harm the defendant will suffer if the

injunction is granted, usually called, in a shorthand way, balancing of harms.

Fourth, that it has a reasonable likelihood of prevailing on the merits, and fifth, that the injunction will not harm the public interest, which always used to be called
will not disserve the public interest. (22)

Now, with respect to the first of those, the lack of an adequate remedy at law -- it is plan that the kinds of damages that could be identified in connection with a couple of finite contracts that are talked about here, really are not enough to provide an adequate remedy to the Plaintiff in this case.

What I said in Paragraph 2 of the TRO remains true after the hearing; that is, that injunctive relief which is a purely equitable remedy is essential to afford an adequate remedy because damages would be both difficult of precise measurement though unquestionably

real and too late to repair the harms sufference by the Plaintiff.

The ability to quantify possibly the amounts lost on specific contracts does not deal with the real problem that the defendants' conduct also makes it impossible to know what true and additional damages are sustainable, and are, therefore, non-quantifiable.

My recollection is that I may have mentioned during the hearing the opinion that I wrote in -- in another preliminary injunction case a couple of years ago in Instrumentalist Company against Marine Corps Leqgues, 509 Federal Supplement 323, a 1981 case.

At that time it was thought that lack of adequate remedy at law and irreparable harm sort of merged in a single standard. But, what I said there at (23)

Page 333, has, I think, more recently been quoted by the Court of Appeals.

I said there there is is not effective way to measure the loss of sales or potential growth. To ascertain the people who don't knock on the doors or to identify the specific persons who do not, in that case it was do not reorder because of the existence of the infringer, that was a trademark infringement case. But, the same principle applies here and, therefore injunctive relief is indeed necessary for full relief and the lack of adequate remedy at law has been demonstrated.

In terms of irreparable harm, Roland Machinery makes plain that what that addresses is the question whether a remedy that's deferred until the end of trial, would be an effective remedy. And for precisely the same reasons that I have stated in Paragraph 3 of the TRO, continues to apply here. That is, that absent preliminary injunctive relief, the

defendants would have the right to, and would indeed continue to do as they already have, inform contractors and other interested parties that Baja is not certified as an MBE, as a concrete supplier, and that therefore employing Baja as a subcontractor for that purpose won't cause the accumulation of any minority credits under the MBE program.

And, that would also supply the contractors of list of, that were purportedly certified by the MBE program, people in competition with Baja and Baja not being on that

list. (24)

That represents irreparable harm and plainly deferring the remedy to the end of trial would not do the job, because the existence of Baja as a viable entity is threatened by the -- those factors and I therefore find that irreparable harm has also been demonstrated.

As to our third element, the balancing of harm, this brings me back to the point that I mentioned earlier, that there is no other City-certified concrete supplier. Indeed, as I understand it, there is only one other and that one is functioning under the -- under an order, maybe a comparable one, entered by some other court. If both Baja and that other party were to retain certification, market forces, I suppose, would operate and the City would get the benefit of the more favorable contract prices resulting from competition on City projects.

As for the -- the City's interest that is stated in the Executive Order, that is, the City of Chicago having a compelling interest in promoting a sense of economic equality among its citizens and its contractors, two things are relevant there.

First, it is speculative to say that that goal would be defeated by what's characterized

as a diversion of funds into non-minority pockets; and second, the City's own failure to implement the Executive Order by the required rules and
regulations, is the direct cause of (25)
that problem and it hardly lies in City's mouth to rely on that factor as somehow demonstrating harm to it.

In total, the balancing of harms strongly favors Baja.

Now, likelihood of success on merits, which used to be called, in some earlier cases, the threshold question you ought to look at, because if a plaintiff lost on that one, there was no point in going any further.

In this case the defendants in their submissions have tried to blur the issues by speaking of merits in terms of whether Baja will ultimately succeed in retaining its MBE certification. But the merits in the current sense, because this is a case about due

process, and this is not somehow an administrative review of what the defendant administrators do. Merits do not mean that ultimate result. What merits means in the current context are the likelihood of ultimate success in establishing a deprivation of due process. That's the reason that I characterize the defendants' argument as a kind of a harmless error notion, though Mr. Pascal preferred, I know, to label it somewhat differently.

One of the important things in seeking to assure that administrative determinations accord due process, is precisely because the law accords administrative determination a broad range of discretion.

That is, the fact that courts are (26)
after all not supposed to second guess administrators by substituting judge's judgment for administrator's judgment.

That's really makes it all the more essential that due process rules be established and that the administrators be required to live by those rules.

That is, that's the only way in which we may assure the fair exercise of discretion. Essentially, defendants' argument is kind of a cynical one. That is, that results are in a terrible way predetermined; don't bother me with the facts, my mind is made up.

And that's really at war with the idea of a society based on law. It's really the essence of either anarchy or totalarianism, and I'm not sure which is preferable. I would suspect neither.

What courts can and must do, in this kind of problem is to assure that the rule of law is followed in the belief -- and I hope it is not a naive one -- that honest administrators will carry out their responsibilities in a

bona fide manner. That's the essence of what due process means by a fair hearing.

Indeed, you don't have to add fair, because all lawyers know that when we talk about hearing, that's what's supposed to be implicit in it.

Now, to the due process inquiry in that context. Due
process requires two things; well more (27)
accurately, a plaintiff to establish a deprivation of due process in the constitutional sense needs two things: First a property interest and second, a showing that, of what due process requires in terms of procedural protections before the parties can be deprived of that property interest.

Now, the prior findings that I have given have already demonstrated the property interest really in two ways. It is unnecessary to repeat that an analysis, except to say that it does show compellingly why the

defendants attempted reliance on the Eidson case and also on Bigby against City of Chicago, is simply wrong. Baja's position just does not equate with that of the unsuccessful plaintiffs in those cases.

All you have to do is to -- is to take a proverbial step backward and read Judge Cudahy's thoughtful analysis in Eidson and contrast it with Baja's situation here to establish that.

Accordingly I conclude that the requisite property interest has been show, in the two ways, in each of the two ways that I have just indicated.

We turn then to the question of due process procedures. That's an inquiry that implicates both the question whether due process requires a pre-deprivation hearing and also what kind have hearing is required.

Both sides agree, as I think they must, that the

relevant standards are those stated by (28) the Supreme Court in Matthews against Eldrige, that's 424 US 319, first at Page 333, where the Court said: "This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest, the right to be" --"the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."

And then again at Page 335, the statement of the three distinct factors that are dictated facts by due process.

First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest including the function involved, and the fiscal and

administrative burdens that the additional or substitute procedural requirement would entail.

As for that first factor, Friend Marshall's statement in Begg, that's B-e-g-g, against Profit, P-r-o-f, Moffitt rather, M-o-double F-i-doubt T, 555 Federal Supplement 1344 at 1350, could well have been written for this case. It says the first Eldridge factor involves the plaintiff's interests. Here the interest asserted is in uninterrupted enjoyment of the disputed benefits pending a hearing. And, in like token our Court of Appeals decision in Freitag, (29) F-r-e-i-t-a-g, against Carter, 489 Federal 2d, 1337 at 1382 said: "Government licensing body that judges the fitness of an applicant must afford that applicant adequate notice and a hearing."

Here we have MBE certification at stake. The property interest discussion that has

already been stated at length presumably satisfies the first factor under Matthews against Eldridge.

The second Matthews against Eldridge factor, that is, that the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional or substitute procedural safeguards is really self-defining as it applies to this case.

The amorphous, the standardless, procedures now followed, clearly creates the risk of effectively unreviewable error.

Once again, referring to Judge Marshall's opinion in Begg at the same page, a provision of a hearing, and I'll deal with what's really meant by a hearing in this sense, also would have had significant benefits, in terms of reducing the risk of error.

The value of additional procedures: What kinds of procedures? The articulation of

standards and informed opportunity to meet the potentially adverse factors before the decision is reached, having had identified for the party what
the adverse problem is, a clear state- (30)
ment of the reasons and if the application is to be effective, and if any potential appeal is to be effective, an identification of the record are unquestionable.

In this case the essential defense from the defendants have been don't bother us, we don't have time. But that's not a permissible answer. This Court should not, of course, be misunderstood, as I mentioned earlier, as ruling a formal trial type evidentiary hearing is required.

Indeed, the defendants' own citation, the Barbian case, 694 Federal 2d, 480, at page 488, without all of the string citations really demonstrates plaintiffs' case for them better than defendants' applications.

Now, as for the third Matthews against Eldridge factor, that one is stated in terms of the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Here too, it is a self-defining one. The defendants have had in the works, but just haven't bothered to implement, the additional and substantial procedural safeguards. They don't even have the excuse of administrative inconvenience. For what they have done is so far short, and the additional requirements are plainly so workable, that they cannot make and have not made, effective arguments in that regard.

In that respect defendants' (31)
memorandum, which talks about paralyzing the procedure, is truly misleading and it's typical of in terrorem arguments that are always possible, but seldom persuasive.

In summary, Baja has demonstrated substantially more than a reasonable likelihood of success on the merits in the sense that's relevant in this case; that is, the demonstration of a property deprivation without due process of law.

Having said those things, then it really goes almost without saying that the role and expression of a sliding scale in which a lesser showing is required on the balancing of harms, if you've made a greater showing on likelihood of success, and vice-versa, really doesn't come into play here because the plaintiff has shown such a substantial position on both of those scores here.

Finally, the last factor is whether the injunction would disserve the public interest. That's -- that's kind of an odd question in a due process case. It is really, I suppose, a contradiction in terms to say that the granting of an injunction to serve

constitutional rights could ever disserve the public interest.

Roland though uses that term in a somewhat different sense, it talks about the potential impact on third parties again as, although without articulating quite that way, in terms of some balancing sort of indication.

Here there has been no effective (32) showing at all that assuring Baja its constitutional rights will bear adversely on any third parties, in a way that those third parties have any right to protect. That is, that they have any legitimate expectancy for.

Accordingly, it is my finding, my conclusion, I should say -- that based on the findings that I have set out herein, I fear, somewhat discursive and disjointed form, that Baja has, indeed, satisfied all of the requisite standards for the granting of preliminary injunctive relief and the form of TRO that was previously entered will take the

form of a preliminary injunction, which of course, is effective unless and until, as the TRO had stated, the City of Chicago were to issue an appealable order at the conclusion of a review of application for certification, as a concrete supplier, conducted in accordance with due process and, equal protection requirements.

* * *

APPENDIX C
IN THE UNITED STATES CIRCUIT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BAJA CONTRACTORS, INC, et al.,	) Docket No. 86 C 2655
Plaintiffs,	)
vs.	)
THE CITY OF CHICAGO, et al.,	) Chicago, Illinois
Defendants.	) June 9, 1986 2:00 o'clock p.m.

TRANSCRIPTS OF PROCEEDINGS
BEFORE THE HONORABLE
MILTON I. SHADUR, JUDGE

APPEARANCES:

For the Plaintiffs:

MR. MICHAEL J. DALEY
MR. DONALD SHINE and
MR. GREGORY WARD

For the Defendants:

MR. ROGER PASCAL

JESSE ANDREWS
Official Court Reporter -
U.S. District Court
219 S. Dearborn Street
Chicago, Illinois 60604
(312) 922-5955

THE COURT: (4)*

* * *

From all of the objective internal evidence, I find that Mr. Jaimes, although he may -- I have no doubt -- be seeking to reflect his best recollection, and although I certainly find from both his demeanor and the nature of his testimony he did not appear to be misstating either the time sequence or the events deliberately, he was nonetheless mistaken with respect to his testimony about Plaintiffs' Exhibit 2.

At the outset, one reason for my having requested the City's file on Baja -- a file which I have gone through and I am also prepared, Mr. Pascal, for you to pick up in chambers -- was to see whether there had been a uniform practice of time-stamping all documents and all correspondence when it was

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* Parenthetical references are to the actual transcript page numbers.

received. It appears from the file that there was not. So the
absence of a date stamp on Plaintiffs' (5) Exhibit 2 is not fatal on the question whether it was or was not delivered to the City before the City issued the February 28th, 1985 certification, that is, Plaintiffs' Exhibit 3.

That then required, it seemed to me, looking at all of the other evidence, as I did. And although I need not detail all of that evidence, I find essentially two facts persuasive on that score.

First is that the list that was given to Mr. Jaimes by Mr. Spieles on January 7th indicates strongly that at that time Mr. Spieles did have access to the original filing. That is, the things that were included in that list and also things that were not called for in that list indicate that he had to be working from something, and that something quite plainly had to be the

preexisting file, which would have included then the December 18th, 1984 Schedule A, which is now Defendants' Exhibit 1. That in turn means that there would have been no occasion for the Schedule A to have had to be redone for submission to the City.

And the second (a related) fact that I find is that the date-stamping of the document delivery by Mr. Jaimes just a couple of days later -- that is January 9th, 1985, coupled with the January 14, 1985 notarization on the Schedule A, which was Plaintiffs' Exhibit 2 -- those things in combination negate any delivery of that second Schedule A to the City.

Mr. Jaimes' own testimony confirmed (6) that there was only one supplemental delivery of documents to Mr. Spieles, that is after the initial December '84 delivery, and therefore Plaintiffs' Exhibit 2 could not have been

included in that one supplemental delivery which took place on January 9th.

Accordingly, I find that Plaintiffs' Exhibit 2 was not delivered to the City before it issued the certification that constitutes Plaintiffs' Exhibit 3. And that in turn means that any consequent findings that I had earlier announced regarding the City's necessary knowledge as to Baja's lease of the concrete batch plant are necessarily withdrawn, and I do withdraw these.

Now, having said that I am required to determine where that leaves the overall findings and conclusions as announced on May 14th. In that respect, it should be made clear once again -- and here there is no dispute -- that Plaintiffs' Exhibit 2 was delivered to Turner Construction. That is, this is not a document that was somehow created for purposes of litigation; it was generated in the ordinary course of business,

and it was in fact, I find, delivered for that purpose.

That is, in other words, to bid on the Turner job Baja did deliver the Schedule A application: the one that is Plaintiffs' Exhibit 2 which bears the January 14th notarization date, showing that Baja had the capacity to carry out that job.
And that meant that it had the lease on (7) the batch plant. That too tracks with the other objective evidence, because the other objective evidence is that that arrangement was made at the beginning of January 1985, so that both the December 18 Schedule A to the City, which is Defendants' Exhibit 1 which omitted the batch plant, and also the January 14th Schedule A delivery to Turner, which is Plaintiffs' Exhibit 2 and which included the reference to the batch plant, both of those documents were accurate. That is, both of those documents were truthful.

Now several corollary findings -- well, maybe not several, at least a couple -- follow from the facts as they have now emerged and as I have just found them.

The first of those is this: By bidding on the Turner contract, Baja disclosed its own perception that its application for certification, if it were approved, would permit it not only to provide services relating to concrete work but also to provide the related supplying of the concrete materials themselves.

It will be recalled -- and I made this a subject of my earlier findings -- that there was no listing by the City of different categories that suggested those two things were somehow distinctive as terms of art; or, as I find I used the term in the May 14th findings, there is no indication that those things existed at all as watertight compartments.

Now although it may well be that (8) some basis exists for defining the two terms "concrete contractor" and "concrete supplier" (if those two things were specifically juxtaposed -- that is, placed side by side) as respectively covering a contractor that renders services only (that being a "concrete contractor") and a materialman that sells materials only (that being then a "concrete supplier"), there is certainly also at least some predicate at the present level of the proceedings (that is, on a preliminary injunction, where the test is a reasonable likelihood of success) for perceiving the Baja certification application as including the potential for providing materials as well as services. And in that respect I do not ignore the Agnos testimony, which comes now in hindsight once an issue has been made of that arguable dichotomy.

To put it differently, when these two things are looked at separately, rather than in tandem, an application for certification in which the party self-designated itself as a proposed "concrete supplier" might perhaps be understood as limited to materialman activity, because supplying does not embrace services by definition (not necessarily). But certainly an application for certification in which the applicant was self-designated as a proposed "concrete contractor" could well be understood as embracing everything necessary to cause concrete both to be brought to the job and to be put into place. That is, the (9) common usage in most, if not all, other areas in the construction field is that the term "contractor" is not one that is limited to the supplying of services. When we talk about a carpentry contractor, when we talk about a plumbing contractor, when we talk about a heating and air-conditioning contractor, in

every instance there is not this sharp differentiation.

Again, let me stress before I go to the next corollary finding that I make this finding in the context of the preliminary injunction proceeding. This does not represent any ultimate finding on my part as to how that issue would come out on trial. What we are looking at is reasonable likelihood of success.

Now that should not be looked at in a vacuum, and that's the reason for my going to the next corollary finding, which is this: As the May 14th findings reflected, Turner's conduct in letting the contract, and in accepting as evidence the February 28th, 1985 certification, as complying with the contract conditions, corroborates the findings or findings that I have just outlined. That is, if you look at it from Turner's point of view, what Turner did was to let a contract for both

the provision of materials and of services as having been satisfied, so far as MBE certification is required, by a certification that read literally, "You are placed under the category concrete contractor after having" -- or it really
didn't even read quite that firmly, the (10) language was a little fuzzier than that -- "after having said we approve your certification, Baja, as an MBE". That fact, that is the Turner conduct, tends to be confirmatory of the fact that at least at the present stage, given the nature of the standard I apply, "concrete contractor" is not to be held as in all events understood in the industry as limited in the manner and to the extent that the City now urges.

For that reason -- for those reasons I should say, in the plural -- my finding that is contained at Pages 12 through 14 of the May 14th transcript, the things that related to

the effect and significance of the evidence regarding Turner, remains intact.

In summary, then, it is unnecessary to the finding of a reasonable likelihood of success, in Baja's demonstrating that City's February 1985 certification extended to MBE status generally, that this Court must have found either: first, that City was somehow on notice of the batch plant, or second, that City's failure to disturb the Turner contract was critical (another issue that has now been raised to deal with the earlier conclusion that I had made). Accordingly, because neither of those findings was necessary to the finding of reasonable likelihood of success, and because the reasonable likelihood of success is independently demonstrated by the corollary findings that I have made today, as well as those

that I have indicated remain unmodified (11)

from the earlier ones, my dependent finding of both the alternative sources of Baja's property interests that I referred to at Page 15 of the transcript of proceedings of May 14th also remains intact.

* * *

APPENDIX D
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BAJA CONTRACTORS, INC. an IllinoisCorporation, and HUMBERTO JAIMES,	)	
Plaintiffs,	)	
vs.	)	No. 86 C 2655 Judge Shadur
THE CITY OF CHICAGO, a Municipal Corporation, MARY SKIPTON, individually and in her official capacity as Acting Purchasing Agent of Chicago, LEROY BANNISTER, individually and in his official capacity as First Deputy Purchasing Agent of Chicago, PAUL SPIELES, individually and in his official capacity as Director of Contract Compliance for the Chicago Department of Purchases, Contracts and Supplies, MCNAIR GRANT, individually and in his official capacity as an employee of the Chicago Department of Purchases, Contracts and Supplies and SAM PATCH, individually and in his official capacity as Administrative Assistant to the Mayor of Chicago	)	
Defendants.	)	

AMENDED PRELIMINARY INJUNCTION

Plaintiffs Baja Contractors, Inc., ("Baja") and Humberto Jaimes ("Jaimes") have filed a Verified Complaint in this action seeking various relief, including injunctive. Counsel for the Defendants City of Chicago ("Chicago"), Mary Skipton ("Skipton"), Leroy Bannister ("Bannister"), Paul Spieles ("Spieles"), McNair Grant ("Grant") and Sam Patch ("Patch") have appeared on their behalf.

This Court initially entered an April 18, 1986 Temporary Restraining Order ("TRO"). During the pendency of the TRO this Court conducted an evidentiary hearing on Plaintiffs' Motion for a Preliminary Injunction, and during the post-hearing period while that motion was under consideration:

1) This Court extended the TRO through May 15, 1986 at 5:00 p.m.

2) This Court received and considered post-hearing memoranda submitted by plaintiffs and defendants.

Based on all the evidence and the post-hearing memoranda submitted by the parties, this Court finds and concludes as follows:

1. This Court has jurisdiction over this cause under 28 U.S.C. §§ 1331 and 1343.

2. This Court stated, in open court commencing at 4:00 p.m. May 14, 1986, the findings of fact ("Findings") and conclusions of law ("Conclusions") on the basis of which this Preliminary Injunction was initially entered. Because it then developed that counsel had inadvertently provided this Court with less than a complete record as to certain relevant exhibits, so the initial Findings and Conclusions were in part based on misinformation given this Court, the

evidentiary hearing was reopened. This Court stated, in open court commencing at 2:00 p.m. on June 9, 1986, the modified Findings required by the evidence adduced at the reopened hearing, and also expressed the reasons that no change would be required in the Conclusions it had initially stated. All this Court's oral Findings and Conclusions on both May 14 and June 8 are incorporated by reference into this order. All the following provisions of this order are intended to summarize certain aspects of, and not to limit in any respect, those oral Findings and Conclusions. To the extent the decretal portions of this order were not dealt with in the course of those oral Findings and Conclusions, they represent the result of oral argument by counsel for the parties, and consideration by this Court, beginning at 10:30 a.m. on May 16, 1986.

3. Baja has no adequate remedy at law. Injunctive relief (a purely equitable remedy) is essential to afford it an adequate remedy, for damages would be both difficult of precise measurement (though unquestionably real) and too late to repair the harm suffered by Baja. That is true in part because defendants' own conduct makes it impossible to ascertain the business lost and to be lost by Baja as a result of the loss of certification (see Instrumentalist Co. v. Marine Corps League, 509 F.Supp. 323 (N.D. Ill. 1981), aff'd. 694 F.2d 145 (7th Cir. 1982), and the quotation of the same Instrumentalist language in Hyatt Corp. v. Hyatt Legal Services, 736 F.2d 1153, 1158 (7th Cir. 1984)). Baja's financial viability has been and will be thereby endangered (see Paragraph 4).

4. If this Court did not grant this Preliminary Injunction defendants would

have the right to, and based on the evidence submitted would in fact:

(a) inform contractors and other interested parties that Baja is not certified by Chicago's Minority Business Enterprise program as a concrete supplier and that employment of Baja as a subcontractor for that purpose will not result in the accumulation of any minority credits under such program; and

(b) supply to contractors a list of subcontractors purportedly certified by Chicago's Minority Business Enterprise program, such sub-contractors being in competition with Baja and Baja not appearing on such list as a concrete supplier.

This Court finds that such actions by defendants have in the past caused, and if engaged in hereafter will continue to cause, irreparable harm to Baja. Any remedy deferred

to the end of trial would be ineffective if equitable (that is, injunctive), because the deprivation of certification under Chicago's Minority Business Enterprise program bars Baja from effective participation in Chicago's public works projects. Such action threatens the existence of Baja. Any remedy deferred to the end of trial would be ineffective if legal (that is, damages), for the reasons specified in Paragraph 3.

5. Baja has presented a prima facie case to establish, and there is reasonable basis to believe and to conclude in fact and in law, that according to the evidence presented:

(a) Defendants have denied to Baja its right to due process of law under the United States Constitution.

(b) Defendants have thereby deprived Baja of its civil rights

enforceable under applicable federal statute.

For the reasons just summarized, the particulars of which have been set forth far more fully in this Court's May 14, 1986 and June 8, 1986 oral Findings and Conclusions, Baja has demonstrated substantially more than a reasonable likelihood of success on the merits of this action.

6. Both the injury and threat of injury to Baja identified in Paragraph 4, which it will sustain if the Preliminary Injunction were denied, far outweigh any harm that may be caused defendants by the issuance of this Preliminary Injunction. If Baja is unsuccessful at trial it is unlikely that any damages will have been suffered by defendants as a result of the issuance of this Preliminary Injunction.

7. In applying the "sliding scale" standard of Roland Machinery Company v.

Dresser Industries, 749 F.2d 380, 387-388 (7th Cir. 1984) (and see Brunswick Corp. v. Jones, 784 F.2d 271, 273-275 (7th Cir. 1986)), this Court finds both the balance-of-relative-harms standard and the likelihood-of-success standard favor Baja. Thus Baja has more than met its burden for obtaining this Preliminary Injunction.

8. On the basis of the evidence it is reasonable to believe that the issuance of this Preliminary Injunction will be in the public interest. There is no basis to consider that the granting of this injunction would disserve the public interest.

It is therefore ordered that until the further order of this Court:

(a) City of Chicago shall not determine that Baja is not a concrete supplier Minority Business Enterprise unless and until the City of Chicago issues an appealable order at the

conclusion of a review of Baja's application for certification as a concrete supplier by the City of Chicago's Minority Business Enterprise Program conducted in accordance with due process requirements established to preserve and protect Baja's property rights pursuant to applicable laws.

(b) Defendants are restrained and enjoined from denying to other City of Chicago contractors minority credits under the City of Chicago's Minority Business Enterprise program for goods supplied and services performed or in progress, as a result of such contractor's engagement of Baja as a concrete supplier subcontractor.

(c) Defendants are restrained and enjoined from informing contractors and other interested parties that Baja is not certified as a concrete supplier under

the City of Chicago's Minority Business Enterprise program and that employment of Baja as a subcontractor will not result in the accumulation of any minority credits under the program.

(d) Defendants are restrained and enjoined from supplying to contractors a list of subcontractors purportedly certified under the City of Chicago's Minority Business Enterprise program, unless Baja's name appears thereon as a concrete supplier.

(e) City of Chicago shall allow Minority Business Enterprise credit for concrete materials and services to be furnished by Baja, to the maximum extent permitted by law (including the special conditions forming a part of every city construction contract), to any contractor who submits a bid to the City during the

term of this Preliminary Injunction, notwithstanding that:

1) the contractor's bid is to be opened and let at a date after the termination of this Preliminary Injunction, but not more than 28 days after the date on which Baja Contractors, Inc. shall have provided its bid to such contractor for concrete materials and services in partial reliance on which such contractor has submitted its bid to the City;

2) the materials and services are to be furnished by Baja at a date after the termination of this Preliminary Injunction; and

3) Baja may not be considered by the City of Chicago to have been certified as a Minority Business Enterprise in the areas of concrete

contracting or concrete supplying or both.

This Court further orders that:

(1) Service of a copy of this Preliminary Injunction shall be made forthwith upon the defendants by any person employed by the law firm of Nisen, Elliott & Meier in any manner provided by the applicable Rules. Proof of service will be filed with this Court.

(2) Baja will supply to defendants a bond in the sum of $20,000 and 4% of any subcontract awarded to Baja as a certified City MBE during the existence of this Preliminary Injunction.

Dated June 12, 1986.

The Honorable Milton I. Shadur
United States District Judge

APPENDIX E

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 16, 1987

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. KENNETH R. RIPPLE, Circuit Judge

Hon. JESSE E. ESCHBACH,
Senior Circuit Judge

BAJA CONTRACTORS, INC., et al., Plaintiff-Appellees,	)	Appeal from the United States District Court for the Northern District of Illinois,
No. 86-1990 vs.	)	Eastern Division
THE CITY OF CHICAGO, et al.	)	No. 86 C 2655 MILTON I. SHADUR, Judge
Defendants-Appellants.	)	

This cause was heard on the record from the United States District Court for the Northern

District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX F

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

OCTOBER 20, 1987

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. KENNETH R. RIPPLE, Circuit Judge

Hon. JESSE E. ESCHBACH,
Senior Circuit Judge

BAJA CONTRACTORS, INC., et al., Plaintiff-Appellees,	) Appeal from the United States District Court for the Northern District of Illinois,
No. 86-1990 vs.	) Eastern Division
THE CITY OF CHICAGO, a municipal corporation, et al., Defendants-Appellants.	) No. 86 C 2655 MILTON I. SHADUR, Judge

O R D E R

On consideration of the petition for rehearing filed in the above entitled cause by

attorneys for plaintiffs-appellees on September 30, 1987, all judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX G

EXECUTIVE ORDER 85-2

WHEREAS the practice of racial, ethnic and sexual discrimination was, in the recent history of the United States, authorized and, in some instances, mandated by law; and

WHEREAS such practice is repugnant to the principles of liberty and equality embodied in the Constitution of the United States and the Constitution of the State of Illinois; and

WHEREAS legal prohibitions against such practice have eradicated neither discriminatory practices nor their effects; and

WHEREAS past discriminatory practices have placed women and racial and ethnic minorities in a position of social and economic disadvantage which has resulted in, among other things, reduced opportunity for them to form and control businesses and in

lack of opportunities for businesses owned and controlled by them; and

WHEREAS there exists a statistically significant disparity between the minority and female populations of the City of Chicago and both the number of minority-owned and women-owned businesses in the City and the number of such businesses being awarded City contracts; and

WHEREAS these disparities reflect the long standing social and economic barriers impairing women and minorities and not their respective capabilities or eagerness to form and manage businesses; and

WHEREAS the lack of economic opportunities for women-owned and minority-owned businesses unnecessarily impedes both social progress and the economic development of the City of Chicago; and

WHEREAS most minority-owned businesses are located in centers of minority population,

and the lack of economic opportunities for such businesses contributes to unemployment in such communities; and

WHEREAS the Municipal Purchasing Act, as amended, requires in most instances that the City's Purchasing Agent award to the lowest "responsible bidder," and the Illinois Supreme Court has interpreted said Act as allowing a bidder's responsibility to be measured in part by his commitment to equal opportunity and affirmative action; and

WHEREAS the City of Chicago is listed as a Labor Surplus Area by the United States Department of Labor; and

WHEREAS small businesses constitute a large segment of the business community, in number of businesses, gross receipts and in number of employees, and are responsible for creation of many new employment opportunities; and

WHEREAS the City of Chicago through its contracting function has a significant impact on local economic activity and business development; and

WHEREAS it is in the best interests of the City of Chicago, its labor force, business community and taxpayers that the local economy be strengthened; and

WHEREAS the City of Chicago has a compelling interest in promoting a sense of economic equality among its citizens and its contractors;

NOW THEREFORE, I, HAROLD WASHINGTON, Mayor of the City of Chicago in the State of Illinois, do hereby ORDER:

1. As used in this order, the following terms shall have the following meanings:

(a) "Minority group" means any of the following racial or ethnic groups, as defined by the United States Equal Employment Opportunity Commission: blacks; hispanics,

regardless of race; Asian-Americans and Pacific Islanders; American Indian and Alaskan Native.

(b) "Minority-owned business" or "MBE" means a business entity which is at least 51% owned by one or more members of one or more minority groups, or, in the case of a publicly held corporation, at least 51% of the stock of which is owned by one or more members of one or more minority groups; and whose management and daily business operations are controlled by one or more such individuals.

(c) "Women-owned business" or "WBE" means a business which is at least 51% owned by one or more women, or, in the case of a publicly held corporation, 51% of the stock of which is owned by one or more women; and whose management and daily business operations are controlled by one or more women.

(d) "Small business" means a business employing fewer than 100 employees, and which

is neither dominant in its field nor the parent, affiliate or subsidiary of a business dominant in its field.

(e) "Local business" means a business located within the corporate limits of the City of Chicago, and which has the majority of its regular, full-time work force located within the City.

(f) "Contract" means any contract, purchase order, or agreement (other than a lease or collective bargaining agreement), awarded by the Purchasing Agent or any officer or agency of the City other than the City Council, and whose cost is to be paid from funds belonging to or administered by the City of Chicago, regardless of source.

(g) "Contractor" means any person or business entity that shall enter into a contract with the City, and includes all partners and all joint venturers of such person.

(h) "Purchasing Agent" means the Purchasing Agent of the City of Chicago.

2. The Purchasing Agent shall establish a goal of awarding not less than 25% of the annual dollar value of all City contracts to qualified MBEs and 5% of the annual dollar value of all City contracts to qualified WBEs.

3. In order to achieve the goal stated in Section 2 of this Order, the Purchasing Agent shall undertake the following measures:

(a) Insert within specifications for each contract for construction of any building, bridge, roadway or other structure a requirement that a bidder commit to the expenditure of 25% of the dollar value of the contract (including any modifications) with one or more MBEs and 5% of the dollar value with one or more WBEs. This commitment may be met by the bidder's status as MBE or WBE, or by joint venture with one or more MBEs or WBEs, or by subcontracting of a portion of the

work to one or more MBEs or WBEs, or by purchase of materials for the work from one or more MBEs or WBEs, or by any combination of the foregoing.

(b) Insert within specifications for all other contracts awarded by competitive bidding a requirement that a bidder commit to expenditure of 25% of the dollar value of the contract (including any modifications thereof) with one or more MBEs and 5% of the dollar value with one or more WBEs. This commitment may be met by the bidder's status as MBE or WBE, or by joint venture with one or more qualified MBEs or WBEs as prime contractor, or by subcontracting of a portion of the work to one or more MBEs or WBEs, or by purchase of materials from one or more MBEs or WBEs, or by any combination of the foregoing.

(c) Consider the extent of each bidder's commitment to MBE/WBE participation as further evidence of the responsibility of the bidder.

(d) Negotiate with any contractor whose contract is not awarded by competitive bidding a commitment to MBE participation of at least 25% and WBE participation of at least 5% of the dollar value of the contract (including any modifications).

(e) Insert in each contract containing a commitment to MBE or WBE participation:

(i) a requirement of periodic reporting by the contractor to the Purchasing Agent on all expenditures made to achieve compliance with the foregoing provision. Such reports shall include the name and business address of each MBE and WBE involved in the contract, a description of the work performed and/or product or service supplied by each such MBE or WBE, the date and amount of each expenditure, and such other information as may assist the Purchasing Agent in determining the contractor's compliance with the foregoing

provision and the status of any MBE or WBE performing any portion of the contract.

(ii) uniform provisions for liquidated damages for a contractor's non-compliance with the commitment to MBE/WBE participation, to be measured by the extent of the contractor's non-compliance.

(iii) uniform provisions for the termination of the contract upon the disqualification of the contractor as MBE or WBE, if (a) the contractor's status as MBE or WBE was a factor in the award of the contract and (b) such status was misrepresented by the contractor.

(iv) uniform provisions for the termination of the contract upon the disqualification of any MBE or WBE subcontractor or supplier of goods or services if (a) the subcontractor's or supplier's status as MBE or WBE was a factor in the award of the contract and (b) the status of the

subcontractor or supplier was misrepresented by the contractor. In the event that the contractor is determined not to have been involved in any misrepresentation of the status of the disqualified subcontractor or supplier, the contractor shall discharge the disqualified subcontractor or supplier and, if possible, identify a qualified MBE or WBE as its replacement.

(v) uniform provisions allowing the Contract Compliance Officer access to the contractor's books and records, including without limitation payroll records, tax returns and records, and books of account, on 48 hours notice, to allow the Officer to determine the contractor's compliance with its commitment to MBE/WBE participation and the status of any MBE or WBE performing any portion of the contract. This provision shall be in addition to, and not a substitute for, any other provision allowing inspection of the

contractor's records by any officer or official of the City for any purpose.

(f) To the extent practicable, the Purchasing Agent shall award contracts requiring the expenditure of funds not exceeding $10,000 to qualified MBEs, WBEs, small businesses and local businesses.

(g) Include MBEs, WBEs, small businesses and local businesses on solicitation mailing lists, and assure that they are solicited for suitable contracts.

(h) Prepare quarterly estimates of standard contract needs, by type of contract and approximate volume and dollar value, in order to enhance the participation of qualified MBEs, WBEs, small businesses and local businesses.

(i) Issue rules and regulations to implement the procedures designed by the

Contract Compliance Officer appointed pursuant to Section 5 hereof.

4. If, in the course of preparing specifications for a contract, the Purchasing Agent determines that it is impossible to obtain qualified MBEs or WBEs to perform sufficient work to fulfill the commitment stated in Section 3 hereof, or that it is impossible to obtain qualified MBEs or WBEs to perform any of the work or supply any product or service required under the contract, the Purchasing Agent may reduce or waive the commitment to MBE/WBE participation in the contract, as may be appropriate.

5. A Contract Compliance Officer shall be appointed within the staff of the Mayor. The Contract Compliance Officer shall perform the following duties:

(a) Supervise the implementation of this Order and report to the Mayor on a quarterly

basis the extent of achievement of the goal stated in Section 2 of this Order, along with any recommendations for modification of the goal or of the measures contained herein.

(b) Establish uniform procedures to apply for certification as MBE or WBE, and to appeal from denial of certification as MBE or WBE. Each application for certification shall be in writing, and executed under oath by an officer or owner of the applicant, and shall contain such information as may assist the Contract Compliance Officer in determining the status of the applicant. Initial certification of any entity as MBE or WBE, or denial of such certification, shall be completed no later than 60 days after receipt of bid or proposal for a contract or subcontract contemplating the applicant's participation as MBE or WBE.

(c) Recruit MBEs and WBEs to apply for certification. Recruitment may be done

through contact with other governments, governmental agencies, community organizations, business associations, advertising or any other suitable means.

(d) Maintain a directory of certified MBEs and WBEs, describing them by name, business address, classification and type of business. This directory shall be made available to any interested person during normal business hours.

(e) Direct certified MBEs and WBEs to notify him/her of any change in ownership, officers or management within 10 days after such change occurs.

(f) Investigate the status of certified MBEs and WBEs to determine whether they should retain certification. An investigation of the status of all currently certified MBEs and WBEs shall be undertaken immediately after the effective date of this Order, with priority

given to investigation of previously certified firms to which contracts or subcontracts are awarded after the effective date hereof.

(g) Establish uniform procedures, consistent with the principles of due process of law, for the decertification of MBEs and WBEs which have been improperly certified or no longer qualify for certification, and for appeal from decertification.

(h) Notify the Purchasing Agent and all governments and governmental agencies which request information on certified MBEs and WBEs of any decertifications made in accordance with subsection (g) of this Section.

(i) Publicize through all appropriate means the program established in this Order, in order to attract qualified MBEs, WBEs, small businesses and local businesses.

6. The head of any executive department or agency of City government, who exercises

any contracting power in behalf of the City beyond the scope of the Purchasing Act, shall consult and cooperate with the Purchasing Agent and the Contract Compliance Officer in achieving the goal stated in Section 3 of this Order through his or her exercise of the contracting power and shall, to the extent possible, implement procedures described in subsections (a) through (e) of Section 3. Each such department or agency head shall report all negotiations and contracts to the Contract Compliance Officer, who shall enforce the commitment to MBE/WBE participation contained therein.

7. This Order shall not apply to any contract to the extent that it is inconsistent with procedures or standards required by any law or regulation of the United States or the State of Illinois or by any ordinance of the City of Chicago.

8. This Order shall take effect upon its filing in the office of the City Clerk.

HAROLD WASHINGTON
Mayor of the City of Chicago

Dated: April 3, 1985

Received:

WALTER S. KOZUBOWSKI
City Clerk

No. 87-1213

In The

Supreme Court of the United States

October Term, 1987

BAJA CONTRACTORS, INC., et al.
Petitioners,

vs.

THE CITY OF CHICAGO, et al.
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROGER PASCAL*
FREDERIC R. KLEIN
Special Assistant
Corporation Counsel
SCHIFF HARDIN & WAITE
7200 Sears Tower
Chicago, Illinois 60606
(312) 876-1000

* *Counsel of Record*

JUDSON H. MINER
Corporation Counsel
CITY OF CHICAGO
511 City Hall
Chicago, Illinois 60602
(312) 744-6900

Attorneys for Respondents
THE CITY OF CHICAGO, ET AL.

Pandick Technologies, Inc., Chicago • (312) 236-0200

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals correctly held that Petitioners were afforded due process when the City of Chicago denied Petitioners' application for certification as a Minority Business Enterprise on the ground that Petitioners' business was a "front" for non-minority businesses.

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No. 87-1213

In The
Supreme Court of the United States
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BAJA CONTRACTORS, INC., et al.
Petitioners,

vs.

THE CITY OF CHICAGO, et al.
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

Petitioners Baja Contractors, Inc. ("Baja") and Humberto Jaimes filed this action under 42 U.S.C. § 1983 against Respondents herein, the City of Chicago ("the City") and five of its employees: Mary Skipton, Acting Purchasing Agent; Leroy Bannister, First Deputy Purchasing Agent; Paul Spieles, Director of Contract Compliance for the Department of Purchases, Contracts, and Supplies;

McNair Grant, Assistant Purchasing Agent; and Sam Patch, Administrative Assistant to the Mayor. Petitioners claimed that Baja was denied certification in the City's Minority Business Enterprise ("MBE") program, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, when the City found that Baja was a "front" for non-minority owned businesses. After hearing, the district court entered a preliminary injunction on Petitioners' behalf.

Respondents filed an interlocutory appeal pursuant to 28 U.S.C. § 1292(a). The Court of Appeals reversed the preliminary injunction, holding, in a fact-intensive opinion, that "with respect to whether Baja was operating as a front, the procedures employed [by the City] were adequate to satisfy the demands of due process", in accordance with the mandate of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Baja Contractors, Inc. v. City of Chicago*, 830 F. 2d 667, 680 (7th Cir. 1987).

In their Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit ("Petition"), Petitioners argue that the Court of Appeals misapplied *Mathews v. Eldridge* to the particular facts of this case. These facts, discussed at length by the Court of Appeals, are summarized below.

1. The Applications for MBE Certification

Baja, an Illinois corporation formed in 1983 by Mr. Jaimes, performed its first contract in 1984 when it earned $ 7,000 acting as a "concrete contractor." A "concrete *contractor*" pours concrete and applies the finishing to concrete areas, and is a business that requires little capital investment.

In December, 1984, Baja applied to the City for MBE certification and described its business as that of a "concrete contractor." Baja listed its only experience as the $ 7,000 concrete finishing job, and stated that its

equipment included the tools used by a "concrete contractor." An employee of the City's Purchasing Department verified that Baja had performed the $ 7,000 contract, received Baja's corporate and other relevant documentation, and then referred Baja's application to the City's MBE Certification Committee for consideration.

The MBE Certification Committee, comprised of personnel from various City departments, reviewed Baja's application and supporting documentation in light of the MBE standards set forth in 49 C.F.R. Part 23, which were promulgated by the United States Department of Transportation ("USDOT") and adopted by the City in administering its MBE program. The regulations state in part that an eligible MBE "shall be an independent business. The ownership and control by minorities or women shall be real, substantial, and continuing and shall go beyond the *pro forma* ownership of the firm as reflected in its ownership documents." 49 C.F.R. § 23.53(a)(2). The regulations also state that substantial concern had been expressed about the infiltration of MBE programs by "fronts" for white-owned businesses, and that consequently it was extremely important to scrutinize all firms seeking MBE certification and participation. 49 C.F.R. Part 23, subpart D, app. A, at 150.

Based on Baja's initial experience as a "concrete contractor" and its possession of the necessary equipment to perform that type of work, the MBE Certification Committee voted to certify Baja as a MBE. Baja was notified by letter dated February 28, 1985, that its application had been granted, and that Baja's specialty would be listed in the City's MBE directory as a "concrete contractor."

Baja never performed work as a certified MBE "concrete contractor." Instead, in May, 1985, Baja began work as a "concrete *supplier*" at the O'Hare Airport Development Project, having received a $ 10 million subcontract to manufacture and supply concrete for the construction. This was

the second contract of Baja's corporate existence, the first having been the $ 7,000 finishing contract in which Baja had performed as a "concrete contractor." In contrast to the function and capability of a "concrete contractor", a "concrete *supplier*" operates a batching plant to manufacture concrete from various raw materials, and uses redi-mix revolving trucks to deliver the manufactured concrete to a construction site. It is a highly capital intensive business requiring specialized training and technological expertise.

After being notified of Baja's $ 10 million concrete supply contract, the City informed Baja that because it had been certified only as a "concrete contractor," it would need to apply for MBE certification as a "concrete supplier." Baja then retained legal counsel to gather and to present evidence in support of its new application for certification as a "concrete supplier."

Baja's attorney, Jerome Siegan ("Siegan"), had been an employee in the City's Law Department, with certain special responsibilities for the City's MBE program, until he joined the Chicago law firm of Arvey, Hodes, Costello, & Burman on June 1, 1985. Before he drafted Baja's application for MBE certification as a "concrete supplier" in July, 1985, Mr. Siegan reviewed 49 C.F.R. Part 23, which he knew contained the standards employed by the City in considering applications for MBE certification, and which articulated the requirement of an applicant's "independence" from white-owned businesses and the concern about the infiltration of MBE programs by "fronts". He then prepared Baja's application and supporting documentation and submitted them to the City.

After receiving these materials, the City's Purchasing Department performed a site inspection of Baja's operations to see if Baja was running the concrete supply business by itself. The inspection revealed that the majority of the employees at Baja's job site worked for two large white-owned businesses, Poulos and Sons ("Poulos") and Material

Service Corporation ("Material Service"), a subsidiary of General Dynamics Corporation, and that Baja lacked the ability to operate the computer system which controlled the concrete mixing plant.

The results of the site inspection were communicated to the MBE Certification Committee, which reviewed that information along with the documentation submitted by Baja. After discussion, the committee voted unanimously to deny MBE certification to Baja as a "concrete supplier." The evidence demonstrated that Baja was not an independently operated concrete supply business, and was dependent upon Poulos and Material Service, two non-minority businesses, for providing the personnel, technical assistance, and equipment necessary to function as a "concrete supplier." That decision and the underlying reasons were communicated to Baja by a letter of September 9, 1985.

2. Reconsideration and Appeal

Shortly after receiving the negative decision, Baja's counsel met with various officials of the City and asked them to reconsider Baja's "concrete supplier" application. Mr. Siegan was again told that the domination and control of Baja by Material Service, the largest concrete supplier in the Chicago area, was the major reason for the denial of the application since Baja appeared to be acting as a "front" for that non-minority business. Baja eventually requested a formal reconsideration by the City in a letter of February 20, 1986, appealed on March 6, 1986 to the Secretary of the USDOT pursuant to the provisions of 49 C.F.R. § 23.55, and filed a written appeal to the City's Purchasing Agent on March 10, 1986.

The Purchasing Agent agreed to consider an appeal, pursuant to which a meeting was held on March 24, 1986 with Mr. Jaimes, Baja's counsel Mr. Siegan, and the Assistant Purchasing Agent, to discuss the basis and the reasons for the City's September, 1985 denial of Baja's application. The Assistant Purchasing Agent requested

additional documents from Baja, and stated that the City would conduct a second site visit of Baja's operations.

During the week of April 7, 1986, a City accountant visited Baja's operations, interviewed Baja's controller, examined Baja's purchase orders, invoices, tax returns, and billing practices, and was given a tour of Baja's facilities. As a result of this examination, the accountant concluded and stated to the First Deputy Purchasing Agent that Material Service was the major source of raw materials purchased by Baja; that Material Service provided invoicing, billing, computerized invoice receipts, and truck leasing services to Baja at no apparent cost; that an employee of Material Service was on Baja's premises mixing the raw materials; and that Baja was acting merely as an agent for Material Service. The First Deputy Purchasing Agent informed Baja's counsel that it was unlikely that Baja would receive favorable treatment on its appeal because the material facts had not changed since September, 1985, when the application had been denied: Baja's concrete supply operations were controlled by a non-minority business.

Thereafter, Petitioners filed suit claiming that the City had deprived them of their property rights without providing due process of law, and after hearing the district court entered a preliminary injunction. The Court of Appeals reversed, holding that "*as applied in this case*", "the procedures employed [by the City] were adequate to satisfy the demands of due process." 830 F. 2d at 679, 680 (emphasis in original).

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS RAISES NO ISSUES JUSTIFYING THE ISSUANCE OF THE WRIT.

A. The Decision Below was Intrinsically Fact Bound, Fact Specific, and Narrowly Drawn.

In reversing the district court's issuance of the preliminary injunction, the Court of Appeals rejected Baja's invitation to analyze due process in the abstract and, instead, focused on the treatment afforded *Baja:*

> We begin by noting the limited, indeed focused, inquiry before us. Our task is not to determine whether the *entire* MBE review process employed by the City affords *all* businesses due process in *all* aspects of the administration of the program. Rather, our task is to determine whether, in the particular posture of this case, Baja was afforded due process when the City proposed to limit its MBE certification so as to exclude its operation as a concrete supplier.
>
> . . .
>
> We believe that the City's procedures, *as applied in this case,* afforded Baja adequate protection against the risk of an erroneous deprivation of its property interest.
>
> . . .
>
> [I]n our view, it is simply unnecessary, in this litigation, to address in such broad fashion the adequacy of *all* of the City's procedures. It is sufficient to determine that, with respect to whether Baja was operating as a front, the procedures employed were adequate to satisfy the demands of due process. Since the course followed by the City authorities in this case adequately reconciled the private and public interests involved and reduced to a minimum the possibility of an erroneous deprivation of Baja's property interest, the mandate of *Mathews* has been met.

830 F. 2d at 677, 679, 680 (emphasis in original).

This Court traditionally has refused to exercise its certiorari jurisdiction to consider such fact specific matters. *See, e.g., Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J., respecting the denial of certiorari), *citing United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). *Accord NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (writ of certiorari presenting primarily a question of fact dismissed as improvidently granted). This Petition supports the wisdom of that general rule.

B. The Considerations for Issuance of the Writ Set Forth in Rule 17 Are Absent in this Case.

None of the considerations articulated in this Court's Rule 17 are raised by this Petition. Petitioners have not suggested that the decision of the Court of Appeals is in conflict with a decision of another federal court of appeals on the same matter, that the decision below is in conflict with that of a state court of last resort, that the Court of Appeals departed from the accepted usual course of judicial proceedings, or that the court below decided a federal question in conflict with the applicable decisions of this Court.

The only remaining Rule 17 consideration, which is the apparent basis for the Petition, seems to be the contention that "a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. . . ." According to the Petition, the important but unsettled constitutional question is the precise scope and "contours" of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), as applied factually and particularly to MBE programs nationwide (Petition at 25).

This fact specific inquiry is not the kind of question contemplated by Rule 17. The broad and fundamental question of constitutional law – the nature and scope of the due process clause in the context of administrative

decisions affecting property rights – has already been settled by *Mathews v. Eldridge* itself, which has given workable and clear direction to the lower courts in adjudicating fact specific claims of procedural due process violations. Indeed, Petitioners describe as "unassailable" the *Mathews v. Eldridge* formulation and analysis for "determining the constitutional sufficiency of administrative procedures," and complain only about the result reached below (Petition at 24, 25). A complaint that the lower court misapplied the law to a particular set of facts simply is not the kind of important and unsettled question which is the focus of Rule 17.

Additionally, the issues raised in the Petition are not appropriate for *judicial* resolution, since Petitioners are essentially asking this Court to promulgate specific due process procedures which must be applied with respect to all MBE programs nationwide. Furthermore, the suggestion of across-the-nation procedural uniformity goes against the grain of the direction staked out repeatedly by this Court over the years in holding that the specific requirements of due process will vary depending upon the circumstances of the administrative program at issue. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 314 (1950) (the particular requirements of due process in a specific situation are those "appropriate to the nature of the case", "with due regard for the practicalities and peculiarities of the case"); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) ("The formality and procedural requisites for the hearing can vary.").

Precisely what kind of hearing is constitutionally required has been left to the lower courts to decide based on the particular facts presented. "Experience teaches that what is fundamentally fair in terms of the form and time of

the notice and hearing must of necessity depend on circumstances that will vary from case to case. No rigid, inflexible formula will fit all situations." *Signet Constr. Corp. v. Borg*, 775 F. 2d 486, 490 (2d Cir. 1985), *cited in Baja Contractors, Inc. v. City of Chicago*, 830 F. 2d at 677. This is exactly why the Court of Appeals focused on the actual facts presented in this case, and why the lower court's judgment based on those particular findings is not an important federal question which should be the subject of the Court's certiorari jurisdiction.

C. The Court Should Not Issue the Writ to Review an Appeal of an Interlocutory Order.

Petitioners brought their motion for preliminary injunction to a hearing before the district judge on an expedited basis, and after the district court rendered its oral opinion, Respondents filed an interlocutory appeal pursuant to 28 U.S.C. § 1292(a). Without having to decide a number of appellate issues raised by Respondents, the Court of Appeals reversed the entry of the preliminary injunction on the very fact specific and narrow grounds discussed above. The case on the merits remains pending in the district court.

The Court's certiorari jurisprudence includes the principle that "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893). *Accord Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application. . . ."). *Cf.* Brennan, *Some Thoughts on the Supreme Court's Workload*,

66 Judicature 230, 231 (1983) ("[W]e have made mistakes in granting certiorari at an interlocutory stage of a case when allowing the case to proceed to its final disposition below might produce a result that makes it unnecessary to address an important and difficult constitutional question . . . "). Given the interlocutory stage of this case, particularly in light of the fact-bound nature of the issues decided below, the Court should deny the Petition.

II. THE COURT OF APPEALS FAITHFULLY APPLIED THIS COURT'S PROCEDURAL DUE PROCESS JURISPRUDENCE.

The Court of Appeals considered the standards set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), in holding unanimously as a matter of law "that the City's procedures, *as applied in this case*, afforded Baja adequate protection against the risk of an erroneous deprivation of its property interest." 830 F. 2d at 679 (emphasis in original). Rather than demonstrating that the Court of Appeals applied erroneous legal principles, Petitioners instead persist in quoting the ultimate legal conclusions reached by the district court (Petition at 29-31) which were rejected by the Court of Appeals. The underlying facts clearly demonstrate that Baja received fair treatment, and support the Court of Appeals' legal conclusion that the mandate of *Mathews v. Eldridge* was met.

Baja was on notice from the outset that it would not receive MBE certification if it acted as a "front" for a non-minority business. Clearly appreciating their burden, Petitioners seized the opportunity to present all of their evidence to rebut the assertion that Baja was a front rather than an independently operated organization. The MBE Certification Committee reviewed the documents prepared by Baja's sophisticated counsel and considered the result of a site inspection, all in light of the MBE standards set forth in the federal regulations. It denied Petitioners' application because of the evidence which revealed that Baja was

acting as a front for white-owned businesses. The decision and the underlying reasons were communicated in writing to Baja, and were then discussed again with Baja and its counsel in several face to face meetings. Again acting through its counsel, Baja presented additional rebuttal evidence and arguments in support of its position, and the City also performed a second site inspection which once again revealed that Baja was dependent upon white-owned businesses for its very existence. Finally, Baja pursued an administrative appeal to the USDOT in accordance with its statutory rights under 49 C.F.R. § 23.55.

No request made by Baja or its counsel to meet with the City was ever refused, and Baja took advantage of many opportunities to present whatever evidence it had to support its claims of independence from non-minority businesses. *Cf. Barry v. Barchi*, 443 U.S. 55, 65 (1979) (no violation of due process where plaintiff "was given more than one opportunity to present his side of the story"). The Court of Appeals applied the appropriate legal analysis mandated by this Court in *Mathews v. Eldridge*, and based on the particular facts below held that the City had not deprived Baja of property without due process of law. It is clear that Petitioners received fundamentally fair treatment, and that their complaint lies not with the process but with the result.

III. PETITIONERS' COUNSEL'S SIMULTANEOUS REPRESENTATION OF PETITIONERS AND RESPONDENT CITY IS GROSSLY IMPROPER, AND UNDER SUCH CIRCUMSTANCES THE COURT SHOULD DENY THE WRIT.

Petitioners' Counsel of Record is Gary L. Starkman of the Chicago law firm of Arvey, Hodes, Costello & Burman ("Arvey, Hodes"). Until the Petition was filed in this Court, neither Mr. Starkman nor any attorney affiliated with Arvey, Hodes represented Petitioners in this litigation, either in the district court or the Court of Appeals.

This was because Arvey, Hodes had admitted to the district judge that it would be unethical to do so.

Mr. Siegan, a member of Arvey, Hodes since June 1, 1985, represented Baja in connection with its application for MBE certification as a concrete supplier, at the same time Mr. Siegan and his firm were representing the City on other matters. When Mr. Siegan took the witness stand on behalf of Petitioners at the preliminary injunction hearing, he testified that "at such time as [he] or [his] firm would have been adverse to the City of Chicago in connection with the Baja matter . . . [he] would have asked the City for permission to do so", and that he "drew the line at the filing of a lawsuit." Transcript of Proceedings before the district court on May 1, 1986, at 212. It is disturbing, therefore, that Arvey, Hodes never sought the consent of its client (the City) to represent Petitioners against the City in *this* Court, even though that law firm is *simultaneously representing the City* on other substantial matters.

By undertaking representation adverse to the City, a *present* client, without seeking and obtaining its permission to do so, Petitioners' counsel has violated the duty of undivided loyalty which an attorney owes to all clients. Model Code of Professional Responsibility DR5-105(B); Model Rules of Professional Conduct, Rule 1.7(a) ("A lawyer shall not represent a client if the representation of that client will be directly adverse to another client. . . . "); *United Sewerage Agency v. Jelco, Inc.*, 646 F. 2d 1339, 1345 (9th Cir. 1981) ("representation adverse to a *present* client must be measured . . . against the duty of undivided loyalty which an attorney owes to each of his clients"); *International Business Machines Corp. v. Levin*, 579 F.2d 271, 283 (3d Cir. 1978) ("An attorney who fails to observe his obligation of undivided loyalty to his client injures his profession and demeans it in the eyes of the public."); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F. 2d 1384, 1386 (2d Cir. 1976) ("Putting it as mildly as we can, we think it would

be questionable conduct for an attorney to participate in any lawsuit against his own client without the knowledge and consent of all concerned.").

The impropriety created by the simultaneous representation is compounded by the fact that Mr. Siegan was an employee in the City's Law Department until May 31, 1985, and had responsibility for supervising the drafting of vital aspects of the City's MBE program. Transcript of Proceedings before the district court on May 5, 1986, at 149-150. Under these circumstances neither Mr. Siegan nor his law firm may represent Petitioners in their *attack* on the MBE program. *See* Model Code of Professional Responsibility DR9-101(B) ("A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."); *LaSalle Nat. Bank v. County of Lake*, 703 F.2d 252 (7th Cir. 1983) (former government attorney and his private law firm disqualified where law firm represented client in litigation against government body); *see also* Model Rules of Professional Conduct, Rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter . . . represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client. . . .").

The appearance by Petitioners' counsel in this Court is grossly improper. The Court need not exercise its discretionary certiorari jurisdiction in favor of such unethical conduct.

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROGER PASCAL*
FREDERIC R. KLEIN
Special Assistant
Corporation Counsel
SCHIFF HARDIN & WAITE
7200 Sears Tower
Chicago, Illinois 60606
(312) 876-1000

* *Counsel of Record*

JUDSON H. MINER
Corporation Counsel
CITY OF CHICAGO
511 City Hall
Chicago, Illinois 60602
(312) 744-6900

Attorneys for Respondents
THE CITY OF CHICAGO, ET AL.

Dated: March 11, 1988

No. 87-1213

In The
Supreme Court of United States
October Term, 1987

BAJA CONTRACTORS, INC. et al,

Petitioners,

vs.

THE CITY OF CHICAGO, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF ADDRESSED TO ARGUMENTS FIRST RAISED IN RESPONDENTS OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GARY L. STARKMAN
(Counsel of Record)
ARVEY, HODES, COSTELLO & BURMAN
180 N. LaSalle; Suite 3800
Chicago, Illinois 60601
(312) 855-5058

DONALD C. SHINE
NISEN & ELLIOTT
200 W. Adams; Suite 2500
Chicago, Illinois 60606
(312) 346-7800

Counsel for Petitioners

Pandick Technologies, Inc., Chicago • (312) 236-0200

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PETITIONERS' REPLY BRIEF ADDRESSED TO ARGUMENTS FIRST RAISED IN RESPONDENTS OPPOSITION TO PETITION FOR CERTIORARI

Pursuant to Supreme Court Rule 22.5, this brief is addressed to arguments first raised in the brief in opposition to the petition for certiorari.

1. This case, dealing solely with the due process requirements which must be followed by a municipality that adopts an MBE

program, is an ideal companion to Richmond, Virginia v. J. A. Cronson Co., 822 F.2d 1355 (4th Cir. 1987), cert. granted, No. 87-998, 56 U.S.L.W. 3555 (2/23/88), dealing with the appropriate circumstances and methods under which municipalities, consistent with constitutional limitations, may create MBE programs.

2. Because the City program at bar is totally devoid of due process and the Seventh Circuit decision so materially inconsistent with the Court's teaching in Mathews v. Eldridge, 424 U.S. 319 (1976), the City has chosen to defend its unconstitutional conduct through an attack on opposing counsel.

3. On the facts at bar, City inspectors twice visited Baja's facility, reached conclusions and reported those conclusions to an MBE Certification Committee which met in secret to deny the application. Baja was never informed of the facts supporting the

conclusions and never given an opportunity to rebut them. Respondent's statement that Baja's attorney was "told that the domination and control of Baja by Material Service, the largest concrete supplier in the Chicago area, was the major reason for the denial of the application since Baja appeared to be acting as a front for a non-minority business" (Br. 5)*/ is not supported by the record.

4. In light of the competitive advantage provided by MBE participation, the burgeoning development of MBE programs throughout the nation and constitutional basis on which they stand, the degree of procedural due process which municipalities must provide before destroying a business is "an important question of federal law which has not been, but should be, settled by this Court" within the contemplation of Sup.Ct.R. 17(c).

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*/ "Br." represents Respondent's Brief in Opposition to the Petition for Certiorari.

Contrary to Respondents' assertion, the issue is neither fact intensive (except to the extent that any procedural due process question is) nor subject to the limitations that preclude consideration of interlocutory orders on certiorari.

5. Because the district court found that "the amorphous, the standardless, procedures now followed, creates the risk of effectively unreviewable error" (5/14/86, Tr. 29), the Seventh Circuit decision, if left to stand, will allow Chicago and other cities to administer their MBE programs on the basis of political and patronage considerations rather than in accordance with benevolent objectives for which they were created.

6. In an effort to camouflage the real issues at bar, Respondents focus their attack on undersigned counsel. They do so on two separate theories: (a) the undersigned firm "is simultaneously representing the City on

other substantial matters" (Br. 13) and (b) an associate in the firm, when working as an Assistant City Attorney, had certain responsibilities with respect to the creation of the City's MBE program. (Br. 14).

7. The "other substantial matters" to which respondents refer is in fact one unrelated lease negotiation. In light of these circumstances, Respondent's interpretation of DR 5-165(B) is incorrect as a matter of law. An attorney is not prohibited from bringing a lawsuit against a client who has retained him to do unrelated transactional work "if there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation." Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976). Respondents references to out-of-context language from a number of cases is misleading; their principal authorities refuse "to

enunciate a per se rule that a client must forego in all circumstances his choice of a particular attorney merely because there is the foreseeability of a future conflict with one of the attorney's existing clients." Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1349 (9th Cir. 1981) (upholding refusal to disqualify firm that had sued its own client).

8. Rather, as a general rule, "simultaneous representation of two such clients is not at all improper if their interests are not inconsistent as against one another and if confidential information received by the attorney from one client is not subsequently used against him while the attorney is working on behalf of the other client." Grove v. Grove Regulator Company, 213 Cal.App. 64, 29 Cal.Rptr. 150 (1963); see City Council of Honolulu v. Sakai, 58 Hawaii 390, 570 P.2d 565 (1977) (in the absence of

misuse of confidential information, law firm may represent City Council as well as sue City on behalf of other clients in unrelated matters).

9. Moreover, although the undersigned firm represents numerous clients in pending cases involving the City, this is the first instance in which disqualification has been requested. While more sophisticated public law officers (such as the Illinois Attorney General) have explicit written regulations governing when outside counsel retained by a public body may sue public agencies or officers, the Chicago Corporation Counsel, to our knowledge, has none. Thus, this situation is similar to that in City of Cleveland v. Cleveland Electric Illuminating Co., 440 F.Supp. 193 (N.D. Ohio 1976), aff'd. mem., 573 F.2d 1310 (6th Cir 1977), cert. denied, 435 U.S. 996 (1978), where the court declined to disqualify a law firm that acted as bond

counsel for the City of Cleveland from representing a private client in a case brought by the City on estoppel grounds as well as the lack of a substantial relationship between the two matters.

10. Respondents also claim that disqualification under DR9-101(B) is required because an associate in the undersigned firm, while an Assistant City Attorney, "had responsibility for supervising the drafting of vital aspects of the City's MBE program." (Br. 14). This contention is disingenous for a number of reasons.

First, the record reference is not to the testimony of the involved attorney (who was not asked what his role was) but to the testimony of a ~~city~~ attorney who indicated that the division which the lawyer administered had supervisory authority for drafting the Executive Order that created the MBE program. However, this case does not

challenge the Executive Order as written; it challenges the City's failure to adopt the regulations required by the Order to assure procedural regularity.

Second, in these circumstances, the courts are concerned with the former government attorney's access to confidential information. If there is a substantial relationship between his public sector activities and the subject matter of a pending trial, the courts recognize a presumption of the receipt of confidential information which may be rebutted. See, e.g., LaSalle National Bank v. County of Lake, 703 F.2d 252, 256 (7th Cir. 1983). This multiple level inquiry has no application to the appellate level where the analysis is limited to facts of record. In any event, the district court accepted trial counsel's representation that the attorney would not be asked about any "confidences and secrets" acquired when he

worked for the City and indicated that "I would not let him do it anyway." (5/5/86; Tr. 190).

Third, DR5-105(D), requiring a law firm to disqualify itself from a matter in which one of its attorneys is disqualified, does not apply if the former government attorney has been screened from any direct or indirect participation in the matter. ABA Formal Opinion 342, at 11 (11/24/75); see also Ill. State Bar Ass'n., Professional Ethics Opinion 811 (1982)(firm is not disqualified so long as former government attorney did "not work on such matters in any way for his law firm or otherwise use any knowledge he gained for the benefit of the firm"). While it is theoretically unnatural to apply these trial related considerations to a matter pending in this Court, it is safe to say that the former Assistant City Attorney has not (and will not

be) involved in the presentation of the case at bar.

11. The undersigned firm could not be involved in the trial of this case for one reason: Under DR 5-102, when it is apparent that a lawyer in the firm is an essential witness on behalf of the client, the firm "shall withdraw from the conduct of the trial...." The Rule specifically applies to trials. "[N]either the model code nor the model rules prohibit the lawyer from assisting substitute counsel in the appeal. Indeed, the lawyer may also appear as counsel of record on the brief and may argue the appeal [when the lawyers trial testimony is not an issue on appeal.]" ABA Informal Opinion 83-1503 (10/30/83).

12. Aside from the trial disqualification (which was recognized ab initio and voluntarily below), there is no cognizable basis for disqualification in this

case. "[D]isqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary." Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982). Accordingly, the federal courts have authorized disqualification only "(1) where an attorney's conflict of interest in violation of [the Code of Professional Responsibility] undermines the court's confidence in the vigor of the attorney's representation of his client, or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation...., thus giving his present client an unfair advantage." Board of Education of New York City v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) (citations

omitted). Neither of these situations apply to the instant case in any conceivable way.

13. In a case before this Court, involving legal questions of profound national significance on a fully developed record, the considerations that give rise to disqualification are inapposite. There is simply no risk that an attorney's conduct will "'taint the underlying trial' by disturbing the balance of the presentations...." Nyquist, 590 F.2d at 1246, quoting, W.T. Grant Co. v. Haines, 531 F.2d 671, 678 (2d Cir. 1976).

14. Therefore, respondents' contention that the Court "need not exercise its discretionary certiorari jurisdiction in favor of such unethical conduct" (Br. 14) is no more than a subterfuge for the avoidance of an exceptionally weak position on the merits. It falls squarely within the generally recognized proposition that "disqualification motions are often interposed for tactical reasons."

Nyquist, 590 F.2d at 1246; see Allegaert v. Perot, 565 F.2d 246, 251 (2d Cir 1977). The suggestion that fanciful (and wholly incorrect) notions of disciplinary infractions provide a reason for this Court to refuse to consider a significant issue of constitutional magnitude is as unseemly as it is untenable.

CONCLUSION

For these reasons, as well as those stated in our original petition, a writ of certiorari should be granted to review, and ultimately reverse, the decision below.

Respectfully submitted,

Gary L. Starkman
(Counsel of Record)
Arvey, Hodes, Costello & Burman
180 N. LaSalle; Suite 3800
Chicago, Illinois 60601
(312) 855-5058

Donald C. Shine
Nisen & Elliot
200 W. Adams; Suite 2500
Chicago, Illinois 60606
(312) 346-7800

Counsel for Petitioners